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NO. 283

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

DONALD F. KNOX,
Petitioner,

vs.

THE STATE OF OHIO
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Donald F. Knox
127 W. Northwood Avenue
Columbus, Ohio 43201
Petitioner

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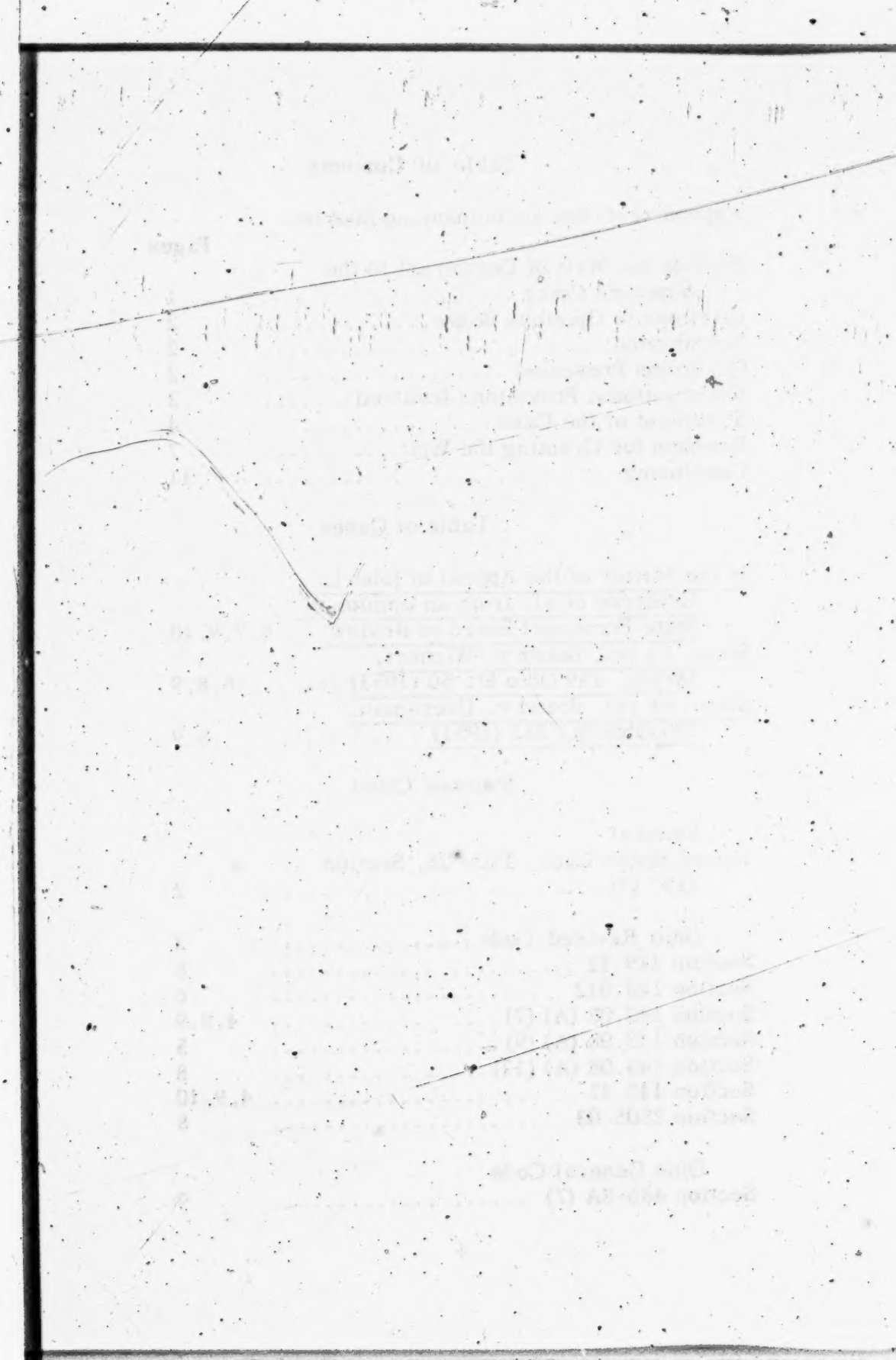

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in the Matter of Appeal of Donald F. Knox from a Decision of the State Personnel Board of Review on January 11, 1967.

CITATIONS TO OPINIONS BELOW

The opinions of the lower courts are unreported, which include those of the State Personnel Board of Review of Ohio, the Common Pleas Court of Franklin County, Ohio, the Court of Appeals of Franklin County, Ohio and the Supreme Court of Ohio. These opinions are printed in the Appendix.

JURISDICTION

The judgment of the Supreme Court of Ohio rendered upon the petitioner's motion for rehearing was entered on January 11, 1967. The Supreme Court of the United States issued an Order Extending Time to file Petition for Writ of Certiorari on April 7, 1967, whereby the time for filing the petition was extended to and including June 10, 1967. The statutory provision believed to confer jurisdiction to review the judgment by writ of certiorari is United States Code, Title 28, Section 1257 (3).

QUESTIONS PRESENTED

1. Does the action of the State Personnel Board of Review of Ohio in ignoring the testimony of the petitioner, in failing to produce evidence upon which to base its final order, and in failing to provide an opportunity for the petitioner to testify in his own defense against the charge contained in its final order constitute a denial of the petitioner's constitutional right to due process of the law under the Fourteenth Amendment.

2. Does the action of the Common Pleas Court of Franklin County, Ohio in ignoring the final order of

the State Personnel Board of Review of Ohio and thus ruling upon an issue not presented to it and in choosing an obviously inapplicable section of the Revised Code of Ohio as a basis for its decision constitute a denial of the petitioner's right to due process?

3. Does the action of the Court of Appeals of Franklin County, Ohio in rendering a decision in the Knox case on May 3, 1966 and then rendering on December 13, 1966 in another case a decision contrary to that in the Knox case constitute a denial of the petitioner's right to equal protection of the law under the Fourteenth Amendment?

4. Does the action of the Court of Appeals of Franklin County, Ohio in failing to utilize the controlling precedent case as a basis for its decision constitute a denial of the petitioner's right to equal protection of the law and due process of the law?

5. Does the action of the Supreme Court of Ohio in failing to hear an appeal from these contrary decisions out of the Court of Appeals of Franklin County, Ohio, as cited above, constitute a denial of the petitioner's right to equal protection of the law?

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner was employed at University Hospital, Ohio State University, Columbus, Ohio as an unclassified employee and was terminated on May 14, 1964 without protection of civil service law. An appeal was filed with the State Personnel Board of Review on October 9, 1964 based on the contention that the petitioner should have been carried in the classified service according to Section 143.08 (A) (7) of the Revised Code of Ohio and thus should have had protection of Section 143.27 of the same code. That contention was examined at a hearing before the Board on December 1, 1964. Also, one single question was asked of the petitioner concerning the time interval between termination and appeal: he replied that he appealed as soon as he learned of his right of appeal (p. 32 of transcript).

On March 18, 1965 the respondent filed a motion with the Board (see record) requesting dismissal of the appeal for reason that it had not been brought within a reasonable period of time. The Board sustained the motion in a decision dated April 9, 1965 (Appendix A). As a result, the petitioner proceeded to raise objections to the denial of certain procedural rights in the following manner, all of which are contained in the record before this Court.

In the memorandum contra motion filed with the

Board on March 22, 1965, the petitioner stated that the respondent had disregarded petitioner's testimony regarding the time interval prior to making an appeal to the Board and had failed to produce evidence in support of a charge of unreasonable delay (p. 1). The petitioner appealed the Board's decision to the Common Pleas Court of Franklin County, Ohio, and in his brief, filed June 16, 1965, he pointed to the Board's ignoring the appellant's testimony about the time interval and failure to produce evidence (pp. 2-3). In the petitioner's reply brief to the same court on August 19, 1965, the failure to obtain evidence was again cited (p. 1). On October 11, 1965, the petitioner filed a motion and accompanying affidavit with the same court. The memorandum in support of the motion again referred to the failure to obtain evidence in support of unreasonable delay and offered the additional objection that the Board had denied the petitioner the opportunity to testify in his own defense against the charge of unreasonable delay (p. 2). The affidavit described each step taken by the petitioner from the time of termination up until the appeal to the Board. A reply memorandum was filed on October 22, 1965 which again raised the objections cited immediately above (pp. 1-2).

The Common Pleas Court of Franklin County, Ohio dismissed the appeal on October 28, 1965 (Appendix B), and in that decision there was no mention of the issues presented before that court; instead, the petitioner was described as being either a deputy or an assistant to a principal executive officer according to Section 143.08 (A) (9) of the Revised Code of Ohio.

The appellant raised procedural and substantive objections to this decision by assignment of error in his

brief to the Court of Appeals of Franklin County, Ohio filed February 8, 1966. First, the petitioner asserted that the Common Pleas Court ignored the final order of the Board and dealt only with the substantive issue which had never been decided by the Board (p. 3 of brief). Also, the petitioner again raised the previously stated objections to the action of the Board (pp. 9-10 of brief).

The Court of Appeals of Franklin County, Ohio rendered a decision on May 3, 1966 (Appendix C), which stated that Knox, being an unclassified employee, had no right of appeal to the State Personnel Board of Review at the outset of the case as based upon Section 143.012 of the Revised Code of Ohio and upon the decision in State, ex rel. Baker vs. Wichert, Mayor, 159 Ohio St. 50 (1953). The Court did not touch upon any of the issues presented to it.

The petitioner appealed to the Supreme Court of Ohio for certification (see record, Aug. 8, 1966) on the basis of the intent of the legislature in formulating section 143.012 of the Revised Code of Ohio and of great public interest. The Supreme Court of Ohio overruled the petitioner's motion to certify on December 14, 1966 (Appendix D).

On December 13, 1966, just one day prior to the decision by the Supreme Court of Ohio in the Knox case, the Court of Appeals of Franklin County, Ohio rendered a decision In the Matter of the Appeal of John L. Crabtree et al. from a decision of the State Personnel Board of Review, Case Numbers 8430-35 (Appendix E). In this decision, a group of unclassified employees were found to have been incorrectly carried in the unclassified service with the result that the court remanded the case to the

State Personnel Board of Review for a hearing on the merits of the dismissal. Thus the court did indeed affirm the jurisdiction of the Board in a question of an employee's unclassified status. Such a decision was directly contrary to that in the Knox case since the Board therein denied such jurisdiction. The petitioner had been denied protection of the civil service law in the matter of his termination whereas Crabtree et al. were granted such protection only a few months later by the same Court.

In response to the Crabtree decision, the petitioner filed in a timely manner a motion for rehearing (see record, Dec. 27, 1966), with the Supreme Court of Ohio on the basis of lack of equal protection of the law, and this motion was overruled on January 11, 1967 (Appendix F).

The petitioner received on April 7, 1967, an extension of time up to and including June 10, 1967 for filing this petition by which an appeal is made from the decision of the Supreme Court of Ohio on January 11, 1967 that overruled the petitioner's motion for rehearing.

REASONS FOR GRANTING THE WRIT

The State Personnel Board of Review denied the petitioner the opportunity to testify in his own defense, dismissed his appeal on a charge that had no supporting evidence, and ignored his testimony regarding the time interval prior to his appeal to the Board. Thus the petitioner was denied due process of the law. The respondent claimed that the petitioner had opportunities to testify: first, when the one question was asked of the petitioner at the hearing relative to the time interval between job termination and appeal and, secondly, at the time of the filing of the motion to dismiss with the Board. The petitioner maintains that he had no obligation in either case

to take the initiative in proving his innocence but that the Board and the respondent bore the responsibility for producing evidence in proof of alleged unreasonable delay.

The Common Pleas Court of Franklin County erred in ignoring the final order of the Board and in choosing an inapplicable section of the Revised Code upon which to dismiss the appeal. Thus the petitioner was again denied due process of the law. The petitioner stated to the Court of Appeals of Franklin County, Ohio that Section 2505.03 of the Revised Code of Ohio provides that the final order of a tribunal may be reviewed when provided for by law and that Section 119.12 of that code is the law that provides for said review from a final order of the State Personnel Board of Review (p. 3 of brief). Furthermore, the petitioner maintained that the court chose what is very obviously an inapplicable section of the Revised Code of Ohio: sub-sections (7) and (12) of Section 143.08 (A) are the only ones that pertain to state employees in educational institutions and (12) was not applicable in the Knox case (p. 11 of brief). At the hearing before the Board, all parties were in agreement on the matter of sub-section (7) being the controlling statute. Furthermore, in State, ex rel. Brand v. Eversman, 155 Ohio St. 383 (1951), the Supreme Court of Ohio employed only sub-section (7) in that appeal of an employee in an educational institution.

The Court of Appeals of Franklin County, Ohio erred in ruling that the State Personnel Board of Review did not have the jurisdiction to hear an appeal from an unclassified employee as a result of failing to utilize the controlling precedent case. This argument was not presented to the Supreme Court of Ohio. The petitioner maintains that the case of State, ex rel. Baker v. Wichert, Mayor, 159

Ohio St. 50 (1953) was not a valid precedent case because the appellant was an unclassified employee who appealed her termination on the basis that she had become a classified employee while working at a job that was normally classified despite the fact that she had taken none of the required procedural steps. Her appeal was correctly denied.

But the petitioner appealed on the basis that he should have been in the classified service; therefore, the controlling precedent case should have been State, ex rel. Brand v. Eversman, 155 Ohio St. 383 (1951), which was decided by the identically same set of judges of the Supreme Court of Ohio as decided the Baker case. Brand, who was an employee of a state educational institution, claimed that he should have been in the classified service. The Supreme Court of Ohio, although denying his appeal on the merits, did provide a thorough examination of those merits as compared with the same court's denial of Baker's appeal without such an examination. The action of the court in the Brand case affirmed a long held principle that an unclassified employee has protection of the civil service law upon raising a question about his unclassified status.

The Court of Appeals, by failing to utilize the controlling precedent case, denied the petitioner due process and equal protection of the law. The latter denial was a result of the fact that Brand received protection under Section 486-8A (7) of the General Code (identical to Section 143.08 (A) (7) of the Revised Code for these purposes) to the extent that his appeal was heard on the merits whereas Knox was denied such protection of the law.

The petitioner appealed from the decision of the Court

of Appeals to the Supreme Court of Ohio on a motion to certify, and this was overruled on December 14, 1966 (see record, that date).

On December 13, 1966, the preceding day, the Court of Appeals of Franklin County, Ohio rendered a decision in the Crabtree case whereby the appeal of a group of unclassified employees was remanded to the Board for a hearing on the merits (Appendix E). Thus the court did affirm the jurisdiction of the Board in an appeal from an unclassified employee and thus granted said employee protection of Section 143.27 of the Revised Code of Ohio. Such action was contrary to the same court's decision in the Knox case, with the result that Knox was denied equal protection of the law.

The petitioner appealed from these contrary decisions to the Supreme Court of Ohio in a timely manner on the basis of lack of equal protection (see record Dec. 27, 1966). This motion for rehearing was overruled on January 11, 1967 (see record, that date).

The Court of Appeals attempted to distinguish between the Knox and Crabtree cases on the basis of the several appellants in the latter case (p. 10, Appendix E), but such is impossible. The respondent also attempted to make such a distinction (see record, Jan. 3, 1967, p. 3) on the basis that the position held by Crabtree et al. had once been carried in the classified service and subsequently illegally removed whereas Knox's position had never been in the classified service. Such is irrelevant: both Knox and Crabtree were in the unclassified service upon their appeals to the Board, which is the crucial point in comparing the two cases and one which

the respondent fully accepted in the memorandum of January 3, 1967 (see record of that date, p. 3).

The Supreme Court of Ohio, by overruling the petitioner's motion for rehearing that was filed on the basis of lack of equal protection of the law, did deny the petitioner equal protection of the law by failing to act upon the contrary decisions in the lower court (see record, Jan. 11, 1967).

The petitioner maintains that these instances of denial of due process and equal protection of the law were prejudicial. The denials of due process were such departures from accepted legal procedure that one can state unequivocally that innumerable litigants have been served by those same courts without becoming subject to errors of such magnitude. The denials of equal protection of the law by the Court of Appeals of Franklin County, Ohio and the Supreme Court of Ohio were prejudicial because other parties, i.e. Brand and Crabtree et al. received protection of the civil service law while the same was denied to the petitioner.

CONCLUSION

Based upon the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

Donald F. Knox
127 W. Northwood Ave.
Columbus, Ohio 43201
Petitioner

FILED
JUN 23 1967
JOHN F. DAVIS, CLERK

NO. 283

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

THE APPENDIXES

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APPENDIX A

Decision of the State Personnel Board of Review

April 9, 1965

Dear Mr. Knox:

The matter of the appeal of Donald F. Knox, Ohio State University, comes on before the Board upon the appellee's motion to dismiss the appeal upon the ground that the appellant failed to bring his appeal within a reasonable time and in a reasonable manner.

The undisputed facts show that the appellant's employment as a Night Clerk at Ohio State University Hospital was terminated on May 14, 1964. It appears that the proper procedure for the removal of an employee in the classified civil service was not followed by the appointing authority for the alleged reason that such appointing authority believed the appellant to be an administrative officer under the exempted category contained in Revised Code Section 143.08, subparagraph (7).

If appellant had, in fact, been such an administrative officer, he would have had no right of appeal to this Board from the procedure followed. If he were not, he had the opportunity to promptly appeal the allegedly non-complying removal. Instead, the appellant did nothing until October 19, (sic 9), 1964, a lapse of time of over five months.

His rights could have been promptly and properly determined; having "slept" on those rights, he cannot now complain.

The motion to dismiss is sustained upon the ground of failure to bring his appeal within a reasonable time (whether or not he was bound by the statutory limitation).

In view thereof, we need not pass upon the second question raised, i.e. whether or not the appeal was brought in a reasonable manner.

The appeal is hereby dismissed.

It is hereby certified by this Board that the above language is a copy of the order entered upon its journal in this case. This decision may be appealed under the provisions of Chapters 143 and 119, Ohio Revised Code, by written notice of appeal setting forth the order appealed from and grounds of appeal filed with this Board and the appropriate court within fifteen days after the mailing of this letter.

Very truly yours,

State Personnel Board of Review

/s/ Earl W. Allison, Chairman
/s/ John P. Cook, Member
/s/ Lowell Fess, Member

APPENDIX B

Decision of the Common Pleas Court, Franklin County, Ohio In re Appeal of Donald F. Knox

DECISION No. 223,181

Rendered this 28th day of October, 1965.

REYNOLDS, J.

This case is before the Court on appeal from a decision of the State Personnel Board of Review, sustaining a motion to dismiss the appeal from an order of the Ohio State University terminating the employment of Donald F. Knox.

The employment was terminated on May 14, 1964, without complying with the provisions of Sec. 143.27 on the basis that Knox was not in the Classified Service and for that reason the statutory provisions are not applicable. Sec. 143.27 provides in part as follows:

> "The tenure of every officer or employee in the classified service of the state and the counties, cities, city health districts, and city school districts thereof, holding a position under sections 143.01 to 143.48, inclusive, of the Revised Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of state personnel or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office.

"In any case of reduction, suspension of more than five working days, or removal, the appointing authority shall furnish such employee with a copy of the order of reduction, suspension; or removal, which order shall state the reasons therefor. Such order shall be filed with the director of state personnel and state personnel board of review, or the commission, as may be appropriate.

"Within ten days following the filing of such order, the employee may file an appeal, in writing, with the state personnel board of review or the commission. In the event such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority.

"In cases of removal or reduction in pay for disciplinary reasons, either the appointing authority or the officer or employee may appeal from the decision of the state personnel board of review or the commission to the court of common pleas of the county in which the employee resides in accordance with the procedure provided by section 119.12 of the Revised Code."

It is to be noted that these provisions relate only to persons in the Classified Service and have no application to those not in the Classified Service. If appellant was in the classified service, the termination was illegal, but if he was not in the classified Service, the action terminating his service was legal.

On October 4 (sic 9), 1964, appellant filed an appeal with the State Personnel Board of Review and on December 1, 1964, the Board heard the appeal and heard evidence

on the motion to dismiss filed by the Attorney General of Ohio, but no decision was reached.

The motion to dismiss was on the ground that the appellant was in the Unclassified Service and the Board of Review had no jurisdiction to hear the appeal. Why this question was not decided, does not appear and there is no explanation for a failure to decide.

Nothing further apparently having been done, the Attorney General on March 18, 1965, filed another motion to dismiss, was sustained by the State Personnel Board of Review. It is from this decision that the present appeal was taken.

The Court has read the record and has reached the conclusion that the position of Knox was such that it was not within the Classified Service and that therefore his services could be terminated without a compliance with the provisions of the statute relating to employees who were in the Classified Service.

The classification of an employee is determined by the duties which are attached to his job or position and is not determined by the particular name of the position filled.

The record shows that on May 17, 1963, Donald F. Knox was hired by the Ohio State University as an Administrative Assistant. On November 15th, 1963, his title was changed to Chief, Night Clerk, but his duties remained the same, and the change of title was only for the reason that other hospitals used the title "Night Clerk" for those persons performing the same duties as were being performed by Knox.

Following are designated by the hospital as the duties and responsibilities of the evening and night Administrative Assistant:

"1. Thoroughly acquaint yourself with the type of work being performed throughout the hospitals and Starling Loving Hall, in all departments and areas.

2. Be available to provide consultation with the night supervisors for administrative actions when necessary.

3. Be familiar with information and instructions in the Press Code and Guide for Interns and Residents.

4. Maintain close contact with the Emergency Room, Morgue, Information Desk, Admitting Office, Night Nursing Supervisor, Maintenance Engineer and Switchboard.

5. The Night Administrative Assistant will maintain his office in Room 185-B on the first floor of University Hospital, telephone #4064.

6. A journal will be maintained in which all important and unusual events will be accurately recorded.

7. Two complete physical tours of the hospital will be made, one during the first half of duty period and one during the latter half.

8. The tour of duty of the Evening and Night Administrative Assistants shall be seven days per week from 5:30 p.m. to 12:30 a.m. and 12:30 a.m. to 8:30 a.m.

9. The switchboard operator and nursing supervisor should know which Administrative Assistant is on duty.

10. Projects will be assigned periodically by the Administrator's Office."

Following is a copy of the contract of employment here involved, so far as applicable:

"Donald F. Knox
The Ohio State University
401

This is written to relate the terms of agreement concerning your employment during 1963-1964. Because the University must have your acceptance before it can complete the appointment procedures, please sign and return the original agreement to this office. The other copy is for your files.

At its meeting held on the above date, the Board of Trustees of The Ohio State University appointed you to the University position listed below. The terms of your appointment are:

1. Title: Administrative Assistant.
2. Department: University Hospital.
3. Salary: $4,224 per year.
4. Your salary will be for service as indicated below and will be paid in equal installments on a twelve months basis, effective July 1, 1963.

* * *

This agreement, including the payment of salary, is subject to the sufficiency of legislative salary appropriations or the receipt of sufficient funds in the Account specified above. The pertinent provisions of the Revised Code of Ohio, of the By-Laws of the Board of Trustees, of the Rules for the University Faculty, and of the Official Actions of the Board of Trustees are expressly incorporated herein and this agreement is conditioned upon full compliance therewith.

John T. Mount,
Secretary, Board of Trustees

I hereby accept appointment under the above terms and agree to render service in accordance therewith.
(signed) Donald F. Knox Date: July 10, 1963"

Revised Code Sec. 143.08 sets out in detail all those employees who are in the unclassified service, and among those so listed, are "deputies and assistants of ** principal executive officers authorized to act for and in the place of their principals ** ."

The Court concludes from the record that Donald F. Knox was, in fact, in the unclassified service and that being the case, the formalities set out in G.C. Section 143.27 were not required to be followed in terminating his services.

The decision of the State Personnel Board of Review is therefore affirmed and the appeal dismissed.

/s/ Dana F. Reynolds, Judge

APPENDIX C

Decision of the Court of Appeals of Franklin County, Ohio. In re Appeal of Donald F. Knox May 3, 1966.

SHERER, J.

It has been stipulated herein that appellant was hired as an employee of the Ohio State University Hospital on May 17, 1963; that the title of that position was then Administrative Assistant; that the position was considered by the hospital to be in the unclassified service; that on September 1, 1963, the title of the position was changed to Chief, Night Clerk, without any change of duties; that appellant's employment was terminated on May 15, 1964, and that the employer did not proceed in accordance with the provisions of Section 143.27 of the Revised Code relating to the removal of employees in the classified service, because the hospital considered appellant's position to be in the unclassified service.

Appellant appealed the termination order of the hospital to the State Personnel Board of Review on October 8 (sic 9), 1964. On December 1, 1964, the hospital moved to dismiss the appeal, contending that appellant's position was in the unclassified service as provided in Section 143.08 (A) (7) of the Revised Code and that said Board of Review has jurisdiction only of appeals of employees in the classified service of the state as conferred by Section 143.012 (A) of the Revised Code. On March 15, 1965, the Hospital further moved for a dismissal of the appeal for the reason that appellant had failed to bring his appeal within a reasonable time and in a reasonable manner. On April 9, 1965, the Board of Review dismissed the appeal for the reason that appellant did not appeal within a reasonable time. The board did not decide the motion of the hospital to dismiss the appeal because appellant was in the unclassified service.

On April 23, 1965, appellant appealed the order of the Board of Review of April 9, 1965, to the Common Pleas Court of Franklin County pursuant to Sections 143.27 and 119.12 of the Revised Code. On December 2, 1965 the Common Pleas Court dismissed the appeal in accordance with its decision of October 28, 1965.

It is appellant's contention that the objective of the hearing before the board on appeal was to examine the nature of the duties performed by him in order to determine whether he had been properly regarded by the hospital as an administrative officer and thus properly placed in the unclassified service or, on the other hand, whether his position was of such a nature that it should have been placed in the classified service affording him civil service protection relative to dismissal as provided in Section 143.27 of the Revised Code.

Section 143.08 of the Revised Code provides that the civil service of the state shall be divided into the unclassified service and the classified service. Appellant contends that the characteristics of the position, Chief, Night Clerk, are such as to place it within the classified service, and that his removal was illegal because the hospital failed to comply with the provisions of Section 143.27 of the Revised Code which relate to the removal of persons in the classified service. It is stipulated that the hospital did not proceed in accordance with such section. Appellant testified (R. 32) that he was carried on the hospital records as an employee in the unclassified service. It is the further contention of appellant that since the characteristics of his position are such as to place it in the classified service, he is entitled to the protection afforded by Section 143.27 of the Revised Code.

The record does not disclose that appellant took a competitive examination for a position in the classified service as provided by Section 143.16 of the Revised Code, or that he was ever on an eligible list as provided by Section 143.19 of the Revised Code, or was ap-

pointed in accordance with the provisions of Section 143.20 of the Revised Code relating to appointments to the classified service. Neither does the record show that appellant took a noncompetitive examination for a provisional appointment in the classified service, or was appointed to such position as provided by Section 143.23 of the Revised Code Relating to provisional appointments in the classified service.

In State, ex rel. Baker v. Wichert, Mayor, 159 Ohio St. 50, 110 N.E. 2d 771, the court held on page 51 that:

> "A person who has never taken a civil service examination, either competitive or noncompetitive, has no standing as a civil service employee and is not entitled to the benefits and protection of the civil service law.***"

That case cited the case of State, ex rel. Lynch v. Taylor, Dir., 136 Ohio St. 417, 26 N.E. 2d 207.

Section 143.012 of the Revised Code empowers the State Personnel Board of Review to hear appeals of employees in the classified service from final orders of appointing authorities relative to discharge. Such Board of Review has other appellate jurisdiction conferred by Sections 143.07, 143.12, 143.27 and 143.272 of the Revised Code. None of these sections empowers the Board to determine that an employee removed from a position in the unclassified service should be considered an employee in the classified service entitled to the protection of Section 143.27 of the Revised Code, where such employee has never taken either a competitive examination and has not been certified for appointment as provided in the civil service laws. We are unable to find any provision in the civil service laws which empowers such board to review the action of the hospital in discharging appellant on the facts disclosed by the record. Appellant's appeal to the Common Pleas Court was from the board's order dismissing

his appeal, not from the reasons given for the order. Appellant's appeal to this court was likewise from the order of the Common Pleas court dismissing his appeal, not from the reason given for the order. Both the State Personnel Board of Review and the Common Pleas Court correctly dismissed appellant's appeal.

The judgment of the Common Pleas Court dismissing appellant's appeal will, therefore, be affirmed.

Judgment affirmed.

DUFFY, J. (Presiding), and CRAWFORD, J., concur.

SHERER AND CRAWFORD, JJ., of the Second Appellate District, sitting by designation in the Tenth Appellate District.

APPENDIX D

Decision of the Supreme Court of Ohio.

December 14, 1966

In re Appeal of Donald F. Knox

Motion for an order directing the Court of Appeals for Franklin County to certify its record.

It is ordered by the Court that this motion is overruled.

Thomas L. Startzman
Clerk

APPENDIX E

Decision of the Court of Appeals of Franklin County, Ohio. In re Appeal of John L. Crabtree, et al.

December 13, 1966

TROOP, J.

John L. Crabtree and five others were employed by the Department of Natural Resources of the State of Ohio and classified as either 8001 Laborer I or 8002 Laborer II. They were dismissed on January 31, 1964, and following the termination of their services attempted an appeal to the State Personnel Board of Review. The board found that they were members of the unclassified service and were, therefore, without a right of appeal. The decision of the board was taken to the Court of Common Pleas of Franklin County which court affirmed the decision of the Board, and from that decision this appeal is taken. The appeals were consolidated in the Common Pleas Court and in this court.

In the course of the hearing before the State Personnel Board of Review, the Attorney General made a motion to dismiss the appeals of the former employees on the ground that the board had no jurisdiction under Section 143.012, Revised Code, to hear appeals of employees in the unclassified service. The motion was sustained. The motion of the Attorney General was supported by evidence designed to show that the former employees were removed from the classified service by an action of the former Civil Service Commission under date of January 12, 1950, as authorized by a section of the General Code, comparable to and essentially the same as the present Section 143.08 (a) (12), Revised Code. The action taken by the commission, as included in the minutes of the body (R. 13), reads as follows:

"*** The Commission directed that appointments made under the classifications of 8001, Laborer I, and

8002, Laborer II, in the State Service be considered as in the unclassified service under the provisions of Section 486-8A-12 of the General Code since it was decided that it would be impractical at this time to include such unskilled labor positions in the competitive classified service. However, this action may be rescinded if at a later time, it could be found practicable to include either or both such classifications in the competitive classified service. ***"

Section 143.27, Revised Code, provides that all employees in the classified service shall have tenure in their positions, Section 143.08, Revised Code, divides the Civil Service into two basic categories, the unclassified and classified service. In turn, subsection (B) divides the classified group into (1) the competitive class, and (2) the unskilled labor class. Included in the competitive class are all those positions wherein it is practicable to determine the merit and fitness of an applicant by competitive examinations. Appointments to the unskilled labor positions are made without competitive examinations from lists of eligible people compiled by the Director of Personnel, or a local commission, after examination or testing with respect to age, residence, physical condition, ability to labor, etc. The unskilled laborer is nonetheless in the classified service and entitled to the protection afforded civil servants, including the processes required by Section 143.27, Revised Code.

All of this seems reasonably clear until we are confronted with a peculiar, if not contradictory, provision contained in Section 143.08 (A) (12), which is the center of the problem in the instant case. The applicable parts of the subsection are as follows:

"(A) The unclassified service shall comprise the following positions, which shall not be included in the classified service. ***

> "(12) *** such unskilled labor positions as the director of state personnel *** may find it impracticable to include in the competitive classified service, provided such exemptions shall be by order of the commission or the director duly entered on the record of the commission or the director with the reasons for each such exemption."

Unskilled laborers are not intended to be included in the competitive classified service as is clear from the act of the Legislature. The language referring to unskilled laborers contained in the above quotation - "impracticable to include in the competitive classified service" - seems flatly contradictory. Some years ago, the Attorney General was called upon to interpret the language and to resolve the conflict and he held, 3 O.A.G. 227 (1915), that the term "competitive classified service" as used in the paragraph was intended to mean and does mean simply "classified service." Such an interpretation is reasonable and is accepted.

Our problem still remains in spite of this interpretation. In the instant case, removal of the unskilled laborers from the classified service to the unclassified service was by act of the former Civil Service Commission under statutory authority the same as that given to the director by the present law. The last action officially taken was on January 12, 1950. The Attorney General argues that the law has been the same for fifty years "and the policy" the same "for at least the last forty-one of those years." (Brief, 7.) In all that period of time there has been no contest of the law nor challenge of the policy and practice says the Attorney General. Certainly, there are no reported cases.

A square look at the provision reveals an important direction attached to the power of transfer or exclusion. The director, or the old Civil Service Commission, may exclude unskilled laborers "by order," "duly entered on

the record" - "with the reasons for each such exemption." An examination of the January 12, 1950, order under which the State of Ohio is still operating, reveals that the commission simply found it impractical to include such unskilled laborers under Classifications 8001 and 8002, Laborer I and Laborer II, in the competitive classified service. The order is totally void of any "reason for each such exemption."

Prior orders of the commission at least make some effort to comply with the requirement of a finding and a supporting reason therefor. On April 20, 1923 (R. 18), they found difficulty in giving practical examinations "fairly testing relative capacity" of unskilled laborers. Included in the minutes is the statement that the problem was due to excessive turnover in common, unskilled labor positions in the State Highway Department together with the temporary character of the majority of such positions.

On August 8, 1930 (R. 16), the commission excluded unskilled laborers earning $4.00 per day or less from the classified service but retained those earning in excess of $4.00 per day except where due to local conditions they were specifically placed in the unclassified group. The supporting reason for the order isn't clearly stated, but the language suggests troublesome variations in rate and labor supply throughout the state.

In the December 23, 1941, order (R. 15), several reasons are stated. A national emergency due to war, a rise in the cost of living, and excessive turnover incident to the difficulty in securing common laborers, are facts advanced in support of the order. Peculiar conditions are recognized in Cuyahoga and Hamilton Counties and the order varied to meet them.

These attempts to comply with all of the requirements of the statute are sharply in contrast to the order of January 12, 1950, which makes no attempt whatever to suggest a reason for the exclusion. The next result

of such an order is to exclude all unskilled laborers in state service from the protection of the civil service statutes because it is more convenient or because policy has developed the way by accident or design.

The error of attempting wholesale transfer of unskilled workers to the unclassified service is further emphasized by a close look at the involved statutory language. Section 143.08 (B) (2), Revised Code, refers to the unskilled labor "class," whereas Section 143.08 (A) (12) says "such unskilled labor positions." It seems perfectly clear that positions are transferable, not an entire unskilled class. Specifically, not the entire Classes 8001, Laborer I, and 8002, Laborer II, but only certain positions within the class and that for a particular reason.

The legislature intended that unskilled laborers should be included in the classified service or it would never have enacted Section 143.08 (B) (2), Revised Code. To hold that at the same time a provision was enacted that would permit an administrative officer or body to nullify the section by administrative fiat is beyond the point of reason. If unskilled laborers are to be removed from the classified service, it should be by legislative act. Until such time as there is legislative change, the statute providing for noncompetitive examinations and appointment from lists of qualified applicants should be followed and only distinct and unusual situations be met by administrative orders supported by adequate reasons.

The question presented by this case has never been squarely faced before. The Attorney General (R.8) says that at least as far back as 1923 the unskilled labor class has been covered by a Civil Service Commission order "placing the unskilled labor class in the unclassified service." If that proposition be accurate, then over that period of time there has been complete and wholesale disregard for the provisions of Section

143.08 (B) (2), Revised Code, and nobody, court or otherwise, has considered and ruled upon the practice. The opinion of the Attorney General in 1915, supra, considered unskilled laborers employed by a county and held that they were in classified service unless removed by a Civil Service Commission order.

In the case of the State, ex rel. Stein, v. Department of Highways of the State of Ohio, et al., 136 Ohio St. 252 (1940) one Joseph Stein asserted that he was an unskilled laborer and in the classified service. The Supreme Court held (page 255) that his amended petition did not disclose any averment that could be construed as compliance with the statutory registration requirement (Section 143.08 (B) (2), Revised Code, and that, therefore, he could not claim tenure. The effect of the peculiar or conflicting provision in the (A) (12) part of the section is not even mentioned.

So in this court's decision, In the Matter of the Appeal of Donald F. Knox, May 3, 1966, No. 8298. The Court was concerned with the position of only one man held to be in the unclassified service as provided in Section 143.08 (A) (7), Revised Code. The court followed two cases, the State, ex rel. Baker v. Wichert, Mayor, 159 Ohio St. 50 (1953) involving only one person, a clerk employed by a municipality, and the State, ex rel. Lynch, v. Taylor, Director of Dept. of Liquor Control, 136 Ohio St. 417 (1940) the subject being one man, a clerk in a state liquor store.

No one of these cases involves a state employee covered by an administrative order removing an unskilled labor classification from the classified service to the unclassified service because the commission, or director, found "it impracticable to include in the competitive classified service."

The principle that a statute should not be interpreted so as to make it ineffective (Brief 5) urged by

the Attorney General is accepted and approved. He cites 50 Ohio Jurisprudence 2d, page 206, Section 220, and the opinion of the Attorney General, supra. The support is adequate as applied, but the quoted rule can not be said to justify an interpretation that results in the total nullification of a substantial portion of a legislative act providing civil service protection for unskilled state employees. It is a far less reasonable interpretation to suggest that the Legislature on the one hand gave civil service protection to the unskilled labor class and at the same time gave an administrative officer or body the right to take that protection away from the class than it is to suggest that the protection was conferred on the class and only certain positions, for good reason, could be removed from it by administrative order.

So radical a change in policy calls for legislative change. If it be left to interpretation by judicial decision, that should come from the Supreme Court of Ohio.

The Common Pleas Court and the State Personnel Board of Review were in error in holding that these appellants were in the unclassified service and without a right of appeal, the decision of the board having been predicated upon an incomplete and improper order of the Civil Service Commission. The judgment of the Common Pleas Court is reversed and the case remanded for further proceeding according to law.

Judgment reversed, cause remanded.

BRYANT, P.J., and DUFFY, J., concur.

APPENDIX F

Decision of the Supreme Court of Ohio

In re Appeal of Donald F. Knox

January 11, 1967

Rehearing

It is ordered by the court that rehearing in this case is denied.

Thomas L. Startzman
Clerk

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FILED
SEP 18 1967
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NO. 283

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

APPENDIX A

ACCOMPANYING THE MOTION THAT THE REVIEW OF THE PETITION FOR WRIT OF CERTIORARI BE DELAYED

DONALD F. KNOX
Petitioner

vs.

THE STATE OF OHIO
Respondent

Donald F. Knox
127 W. Northwood Ave.
Columbus, Ohio

Petitioner

IN THE COURT OF APPEALS, FRANKLIN COUNTY, OHIO

In the Matter of the
Appeal of Donald F. Knox :
from a Decision of the : Case No. 8298
State Personnel Board of :
Review

A MOTION THAT THE DECISIONS OF THE LOWER COURTS BE REVIEWED

PRESENTED UPON THE SECOND APPEAL TO THE COURT OF APPEALS

Donald F. Knox
127 W. Northwood Ave.
Columbus, Ohio

Appellant

William B. Saxbe
Attorney General
State of Ohio

Robert M. Zitko
Assistant Attorney General
State House Annex
Columbus, Ohio

Attorneys for Appellee

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MOTION

The appellant, Donald F. Knox, now comes before this court for the second time in the matter of his appeal from a decision of the State Personnel Board of Review. The appellant requests that this court review the decisions rendered in this case by the Board and the Franklin County Common Pleas Court.

MEMORANDUM IN SUPPORT OF THE MOTION

The bases for the above motion are as follows. 1) The case is still within its appeal time since a Petition for Writ of Certiorari has been filed with the Supreme Court of the United States and will be acted upon early in the October Term, 1967. 2) The appellant was denied the right to have presented before the Supreme Court of Ohio, in his earlier motion to certify, several instances of denial of federal constitutional rights due to an error in judgment on the part of his former attorney, John A. Brown, who had been specifically informed of the appellant's intention to proceed to the Supreme Court of the United States if necessary. 3) This appeal cannot be brought before the Franklin County Common Pleas Court since that court rendered an adverse decision pertaining to the substantive question in the case against which this appeal contains a complaint.

The remaining bases for the motion support the appellant's contention that this court is no longer bound by its adverse decision rendered on May 3, 1966 upon the appellant's first appeal. First of all, the decision of the Supreme Court of Ohio on June 15, 1966 in the case of State, ex rel. Bingham v. Riley, County Eng. 6 Ohio St. 2d 263 did in effect overrule the decision of

this court in appellant's case. The Supreme Court of Ohio, upon an appeal by the appellants, decided that the earlier order of the State Personnel Board of Review was res judicata and thus not subject to the collateral attack that the appellee had brought against said order of the Board. As a result, the decision of the Board which returned several unclassified employees to their jobs was allowed to stand. Thus the Supreme Court of Ohio did, in effect, affirm the right of an unclassified employee to appeal to the Board on the question of his unclassified status and thus did, in effect, overrule the decision of the Court of Appeals in the appellant's case.

The second basis for appellant's contention that this court is no longer bound by its earlier decision in this case is the decision by this court on December 13, 1966 in the Matter of the Appeal of John L. Crabtree et al. from a Decision of the State Personnel Board of Review. By remanding that appeal to the Board, this court did directly affirm the right of an unclassified employee to appeal to the Board on the question of his unclassified status. Furthermore, said decision did overrule this court's decision in appellant's case wherein the appellant was denied such a right.[1] The Supreme Court of Ohio overruled the appellee's motion to certify in the Crabtree case on May 17, 1967 and thus allowed the earlier decision of this court to stand. By such action the Supreme Court of Ohio did, in effect, also affirm such a right of an unclassified employee as it had done in the Bingham case. Also, the Supreme Court of Ohio by its action in the Crabtree case did, in effect, overrule the decision of the Court of Appeals in appellant's case.

Regarding 2) above, the matter of the failure of the appellant's former attorney to present to the Su-

preme Court of Ohio the instances of denial of federal constitutional rights is examined under the separate cover entitled Instances of Denial of Federal Constitutional Rights, pages 2-3 and 10-15 inclusive, with reference therein being made to the accompanying Affidavit. The former attorney should have either acted in accordance with the expressed objective of the appellant or withdrawn from the case, but he did neither for several months until such a withdrawal finally took place under unusual circumstances. The latter action and other unusual actions on the part of the former attorney are described on pages 5, 11, and 14-18 under the separate cover cited above.

The appellant maintains that this failure by Mr. Brown was not due to an error since he is very knowledgeable and experienced. Mr. Brown simply made a decision concerning the future of the case which was not his to make and which was in conflict with the appellant's decision to appeal to the Supreme Court of the United States if necessary.

The decisions of the State Personnel Board of Review and the Common Pleas Court still stand, and it is to those decisions that the appellant directs the attention of the court. With regard to those decisions there were certain unusual actions by the Board and the Assistant Attorney General that should be noted. Such actions are described in the Instances of Denial of Federal Constitutional Rights: relative to the Board see pages 4-6; relative to the Assistant Attorney General see pages 13-16 and footnote 3, p. 18.

CONCLUSION

The appellant requests that this court review the instances of denial of federal constitutional rights which

were not presented to the Supreme Court of Ohio by Mr. Brown. As a result of that failure, the appellant contends that he has a right in terms of basic principles of justice to appeal for a second time to the courts of Ohio in order to seek a remedy for the deficiency described above.

Respectfully submitted,

Donald F. Knox
Appellant

FOOTNOTE

[1]The decision of the Court of Appeals in the Crabtree case contains certain sentences which are not clear to the appellant. Such a matter is of critical importance to the ultimate disposition of appellant's case, and for that reason the appellant offers the court an examination of this matter in the Motion that the Court Receive an Examination of the Identical Aspects of the Knox and Crabtree cases. The latter motion also has immediate relevance to an erroneous statement in the appellee's Memorandum Contra Motion for Rehearing to the Supreme Court of Ohio in the Knox case. (See Instances of Denial of Federal Constitutional Rights, p. 15.)

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing motion was mailed to Robert M. Zitko, Assistant Attorney General, State House Annex, Columbus, Ohio, on the __ day of September, 1967.

Donald F. Knox
Appellant

I certify that a copy of the foregoing motion was mailed to John A. Brown, Attorney at Law, 42 East Gay Street, Columbus, Ohio, on the ___ day of September, 1967.

Donald F. Knox
Appellant

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 18 1967
JOHN F. DAVIS, CLERK

NO. 283

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

APPENDIX B

ACCOMPANYING THE MOTION THAT THE REVIEW OF

THE PETITION FOR WRIT OF CERTIORARI BE DELAYED

DONALD F. KNOX
Petitioner

vs.

THE STATE OF OHIO
Respondent

Donald F. Knox
127 W. Northwood Ave.
Columbus, Ohio

Petitioner

IN THE COURT OF APPEALS, FRANKLIN COUNTY, OHIO

In the Matter of the Appeal of Donald F. Knox from a Decision of the State Personnel Board of Review : Case No. 8298

INSTANCES OF DENIAL OF FEDERAL CONSTITUTIONAL RIGHTS PRESENTED IN SUPPORT OF THE MOTION THAT THE DECISIONS OF THE LOWER COURTS BE REVIEWED

Donald F. Knox
127 W. Northwood Ave.
Columbus, Ohio

Appellant

William B. Saxbe
Attorney General
State of Ohio

Robert M. Zitko
Assistant Attorney General
State House Annex
Columbus, Ohio

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STATEMENT OF THE FACTS

The appellant was terminated from his job at the University Hospital of Ohio State University on May 14, 1964 and appealed to the State Personnel Board of Review on October 9, 1964. The hearing on December 1, 1964 dealt almost exclusively with the question of whether or not the appellant had been improperly left in the unclassified service. Both sides agreed that if he had been improperly left in the unclassified service based upon Section 143.08 (A) (7), Revised Code, then he should be returned to his job with full benefits since the appointing authority had not complied with Section 143.27, Revised Code, in making the termination.

The appellee brought a motion to dismiss the appeal on March 18, 1965 on the basis that the appellant exercised an unreasonable delay in bringing his appeal to the Board, and the Board sustained said motion on April 9, 1965. An appeal was then taken to the Franklin County Common Pleas Court, and it was dismissed on October 28, 1965 for the reason that the appellant allegedly had been either a deputy or an assistant to a principal executive officer according to Section 143.08 (A) (9), Revised Code. An appeal was then made to the Franklin County Court of Appeals, and that was dismissed on May 3, 1966 on the ground that the appellant, having been an unclassified employee, had no right to bring before the Board at the outset of the case the question as to whether he had been improperly left in the unclassified service. That opinion was based upon Section 143.012, Revised Code.

The motion to certify to the Supreme Court of Ohio was overruled on December 14, 1966. A motion for rehearing was then filed on the basis of the decision on December 13, 1966 by the Franklin County Court of Appeals in the Matter of the Appeal of John L. Crabtree

et al. from a Decision of the State Personnel Board of Review (Numbers 8430-35). The appellant contended that the latter opinion was contrary to the opinion of the same court in his own case; as a result, the motion for rehearing was based upon a denial of equal protection of the law. (For further facts on Crabtree case, see footnote 1 in the "Motion that the Decisions of the Lower Courts be Reviewed...") The motion for rehearing was overruled on January 11, 1967.

A petition for writ of certiorari in this case is now awaiting action in the Supreme Court of the United States; the case is entitled Knox v. Ohio, October Term, 1967. No. 283.

The above record provides no information concerning events that took place from the time of the appeal to the Board on December 1, 1964 until the appellee's motion to the Board to dismiss the appeal as of March 18, 1965. Those events are described in the "Affidavit..." and discussed under this cover.

The official record in the case is on file with the Supreme Court of the United States; a copy is available.

A SUMMARY OF THE FAILURE TO PRESENT TO THE SUPREME COURT OF OHIO THE INSTANCES OF DENIAL OF FEDERAL CONSTITUTIONAL RIGHTS

The instances of denial of federal constitutional rights at all stages of the case are presented in the succeeding sections. None of those instances were presented to the Supreme Court of Ohio in the motion to certify or at the hearing on the motion.

Attorney John A. Brown represented the appellant in the appeal to the State Personnel Board of Review and

filed the brief with the Common Pleas Court, after which he was dismissed from the case. Adverse decisions, with respect to the appellant, followed in the Common Pleas Court and the Court of Appeals; Mr. Brown once again became counsel for the appellant following the decision in the Court of Appeals and at the same time represented the interest of the Ohio Civil Service Employees Association in appellant's case.[1] The latter organization agreed to compensate Mr. Brown for his services in the event that the appeal was lost since a contingency arrangement existed between Mr. Brown and the appellant (affidavit, #25, p. 6).

Mr. Brown was intimately acquainted with the details of the appeal to the Board since he represented the appellant; also, he was kept informed of the succeeding decisions in the case. He expressed to the appellant his surprise over the latter two decisions, and he discussed with the appellant the decision of the Court of Appeals and stated that it was in error and that the precedent case, as employed by the Court of Appeals, was inapplicable to appellant's case (affidavit, #24, p. 5). But despite the above described acquaintance with the facts and the instances in which the appellant informed Mr. Brown of his desire to proceed to the Supreme Court of the United States if necessary and of other pertinent matters as described below, Mr. Brown made no effort to bring the matter of denial of federal constitutional rights before the Supreme Court of Ohio in conjunction with the motion to certify. This failure on the part of Mr. Brown constitutes the basis of this new appeal to the courts in Ohio.

It is true that Mr. Brown did bring the matter of the contrary decisions of the Court of Appeals before the Supreme Court of Ohio in the form of a motion for rehearing; but, this was done upon the insistence of the appellant

(affidavit, #35, p. 8). But even in this instance, Mr. Brown failed to notify the Supreme Court of Ohio of the glaring factual errors contained in the appellee's "Memorandum Contra Motion for Rehearing," which might very well have been the basis for the overruling of the appellant's motion for rehearing. (See pp. 15-16 concerning this failure on the part of Mr. Brown)

The various instances of denial of federal constitutional rights are described on the succeeding pages.

DENIAL OF DUE PROCESS OF THE LAW BY THE STATE PERSONNEL BOARD OF REVIEW

As stated above, the hearing before the Board dealt almost exclusively with the question of the appellant's unclassified status. The final question at the hearing was asked by Mr. Allison with regard to the reason the appellant waited from the date of job termination on May 14, 1964 until October 9, 1964 to appeal to the Board. The appellant answered that he appealed as soon as he had learned of a right of appeal. Mr. Allison asked nothing further.

From the time of the hearing on December 1, 1964 until the Board's decision on April 9, 1965, certain events took place that have not been previously entered into the public record of the case but which are now described in the accompanying affidavit (#1-#17). The appellant contends that those events constituted the original denial of due process of law. During that period of time just described, the appellant became engaged in negotiations with the appellee, the Ohio State University, and said negotiations were initiated by the appellee (affidavit, #1, #2, #4, pp. 1-2). During that period of negotiations the chairman of the Board, Mr. James R. Gould, resigned from

his position as of February 8, 1965 (affidavit, #9, p. 3). and Mr. Earl Allison became chairman on February 18, 1965 (affidavit, #11, p. 3). The appellant meanwhile was left under the impression that the Board that had caused the University to offer to negotiate was still intact. The result of this misconception was that the appellant waited confidently for an answer to his final offer, believing all the while that he could request a final ruling in his favor from the Board that had caused the University to offer to negotiate should the negotiations become stalled. The appellants attorney, Mr. Brown, never informed the appellant of the change in the Board, although he knew very well of the misconception entertained by the appellant (affidavit, #7, p. 3 and #14, p. 4).

On March 18, 1965 the appellee filed with the Board a motion to dismiss the appellant's appeal, and it was only after that that the appellant learned of the change in the Board from a party other than Mr. Brown (affidavit, #16, p. 5). The appellant contends that this withholding of such critical information from him constituted a denial of due process of law on the part of both the old and the newly constituted Boards since the appellant had a right to be informed of the change so that he might have requested a final ruling from the Board that conducted the hearing and which had caused the University to initiate negotiations. The withholding of said information also constituted a serious error in judgment on the part of Mr. Brown.

The second instance of denial of due process of law resulted from the decision of the Board on April 9, 1965. The appellant contends that the Board's charge of unreasonable delay in bringing the appeal was a denial of due process for the following reasons: 1)the Board produced no evidence to support such a charge since it made no effort to demonstrate that the appellee would suffer damage

by the delay if the appellant should have returned to his former job; 2) the Board ignored the appellant's testimony that he had appealed as soon as he learned of his right of appeal; and 3) the Board denied the appellant an opportunity to testify in his own defense against the charge of unreasonable delay. These points were raised in the briefs and memoranda of the appellant to the Franklin County Common Pleas Court and Court of Appeals, but they were not described as denial of due process of law.

Furthermore, regarding the charge of unreasonable delay, Mr. Allison, the new chairman of the Board, was informed by a letter from the appellant and by conversation with Mr. Brown immediately following the Board's decision of the steps the appellant took in the interval prior to bringing the appeal (affidavit, #18, #19, #20, #21, p. 5). Mr. Allison replied in writing to the appellant's letter and implied that the appellant had falsified a portion of the information that the latter had presented to him (affidavit, #22, p. 5). Such an allegation was improper because 1) the Board had given the appellant no opportunity to testify and produce witnesses in defense against the charge of unreasonable delay; and 2) Mr. Allison had talked directly with Mr. Brown about the period of the delay, and it was the latter who had directed the steps taken during that period. Mr. Allison and the Board had full access to the facts about the alleged unreasonable delay but ignored them.

Regarding the alleged unreasonable delay in bringing the appeal to the Board, a detailed listing of the steps taken by the appellant in bringing that appeal was presented in the form of an affidavit to the Common Pleas Court on October 11, 1965 and is part of the Official record on file with the Supreme Court of the United States.

Upon the appellee's submission of the motion to dismiss to the Board on about March 18, 1965 (affidavit, #13, p. 4), the appellant urged Mr. Brown to present to the Board a listing of the steps taken prior to making the appeal to the Board (affidavit, #14, p. 4). Mr. Brown stated that such would not be necessary since the appellant stated at the hearing that he had appealed as soon as he learned of his right of appeal (affidavit, #15, p. 4).

DENIAL OF DUE PROCESS OF THE LAW BY THE FRANKLIN COUNTY COMMON PLEAS COURT

The appeal to the Common Pleas Court was dismissed on October 28, 1965 for reason that the appellant had been either a deputy or an assistant to a principal executive officer according to Section 143.08 (A) (9), Revised Code. Such a decision is clearly a denial of of due process since subsection (9) has absolutely no relevance to employees in educational institutions. A casual reading of Section 143.08 (A) in entirety serves to demonstrate that point. But if proof is needed, one can turn to Opinions of the Attorney General of Ohio, 1965, opinion number 65-79, page 2-164, par. 3, which states:

> Employees who work at institutions of higher education of the State of Ohio who are not specifically designated in Section 143.08 (A) (7) comprising the unclassified service. (emphasis added)

The Court could have easily noted that no mention of subsection (9) was made by either the appellee or the Board at the hearing before the latter.

A second instance of denial of due process of law by

the same court was its failure to comply with Section 2505.03, Revised Code, which provides that "every final order, judgment, or decree of a court and, when provided by law, the final order of any administrative officer, tribunal or commission may be reviewed...." Section 119.12, Revised Code, is the statute that provided for the review of a final order of the Board. The Common Pleas Court denied the appellant due process of law by completely ignoring the final order of the Board and proceeding to deal with the substantive question which had never been presented to that court in any of the briefs of either party nor at the hearing.

DENIAL OF EQUAL PROTECTION OF THE LAW AND DUE PROCESS OF THE LAW BY THE FRANKLIN COUNTY COURT OF APPEALS

The Franklin County Court of Appeals in its decision of May 3, 1966 stated that the appellant, having been carried as an unclassified employee, had no right at the outset of the case to bring before the Board a question concerning his unclassified status, based upon Section 143.012, Revised Code. The appellant contends that he was denied due process and equal protection of the law as a result.

The appellant considers the matters related immediately below to be of no immediate relevance to the future course of the case as a result of the decision of the Court of Appeals in the Crabtree case on December 13, 1966 and the subsequent decision of the Supreme Court of Ohio in the same case, as described in the motion to the Franklin County Court of Appeals requesting a review of the decisions of the lower courts (also see footnote #1 in the motion just cited). However, the appellant chooses to present the material below in order to complete the record concerning the instances of denial of federal constitutional

rights and the failure of Mr. Brown to bring such information before the Supreme Court of Ohio.

The Court of Appeals, in basing its decision upon State, ex rel. Baker v. Wichert, Mayor, 159 Ohio St. 50 (1953), chose a precedent case that was inapplicable due to containing a different type of appeal. Thus the court ignored the true precedent case, which was State, ex rel. Brand v. Eversman, 155 Ohio St. 383 (1951) that was decided by the identically same set of judges as in the Baker case. Furthermore, in making said error, the court fell into two other errors: first, it ignored a series of cases (pp. 11-12) in which the courts in Ohio upheld the right of an unclassified employee to bring before the courts a question concerning his unclassified status under the terms of the civil service law just as if he had been an employee formally carried in the classified service; and secondly, that court lifted out of context the concluding portion of the decision in the Baker case and used it to support its decision in appellant's case. That portion was out of context because the Baker case is applicable only in an instance where an employee would claim to have gained classified status by working at a job that was normally classified but had not complied with the statutory requirements for attaining such status. But the appellant appealed on a different basis, that being that he had been erroneously left in the unclassified service, and it was this feature that caused the Brand case to be the applicable precedent case.

The appellant maintains that the above error in choosing an inapplicable case as a precedent constituted a denial of due process and equal protection of the law. The latter denial results from the fact that Brand and the other appellants in the cases listed below (p. 12) received protection of the civil service law to the extent that the courts

of Ohio granted a thorough examination of the question of their unclassified status while the appellant was denied such an examination by the Board under the same civil service law.

As has been previously stated, the above matters seem no longer of immediate relevance to the future of the case but were stated for purposes of the record of instances of denial of federal constitutional rights and of the failure on the part of Mr. Brown to bring those matters before the Supreme Court of Ohio. The details of the latter problem will now be presented.

It is upon said failure of Mr. Brown to bring such matters before the Supreme Court of Ohio that the appellant bases his second appeal to the courts in Ohio while action on the petition for writ of certiorari is pending in the Supreme Court of the United States. And it is in support of that appeal to the courts in Ohio that the appellant presents the following information.

Immediately following the decision of the Court of Appeals on May 3, 1966 in the appellant's case, Mr. Brown stated that the decision was in error and that the Baker case, as employed by the court, was not a valid precedent case. Despite all of that, Mr. Brown at no point suggested presenting a motion for rehearing to the Court of Appeals. Mr. Brown, having been out of the case when it came before the Common Pleas Court and the Court of Appeals, became once again counsel for the appellant on about May 12, 1966 (affidavit, #23, #25, pp. 5-6).

Mr. Brown submitted to the Supreme Court of Ohio a memorandum in support of the motion to certify on about August 8, 1966 and that memorandum contained practically no analysis of the substance of the decision of the

Court of Appeals but dealt only with the matter of the great public importance of the decision. Such an omission prevailed despite Mr. Brown's remarks concerning the decision, as reviewed above, and despite certain other matters brought to his attention as described below.

First, the appellant clearly informed Mr. Brown on about May 25, 1966 of his desire to appeal to the Supreme Court of the United States if necessary (affidavit, #25, p. 6). Furthermore, the appellant informed Mr. Brown on about June 2, 1966 that he believed that the then pending decision of the Supreme Court of Ohio in the case of State, ex rel. Bingham v. Riley, County Eng., 6 Ohio St. 2d 263 would have relevance to the decision of the Court of Appeals in the appellant's case if the decision in the Bingham case should favor the appellants in that case. Mr. Brown rejected such a theory at the time (affidavit, #27, p. 6). The decision of the Supreme Court of Ohio in the latter case was rendered on June 15, 1966 and was favorable to the cause of the appellants; Mr. Brown made no reference to it in the appellant's memorandum in support of motion to certify. But several months later following the appeal to the Supreme Court of Ohio, Mr. Brown admitted to the appellant that said decision could be utilized in arguing the cause of the appellant in the future (affidavit, #36, p. 9).

On about June 13, 1966 the appellant wrote to Mr. Brown and described various civil service cases and their relationship to the decision in the Baker case which had been employed as a precedent case by the Court of Appeals in appellant's case (affidavit, #28, p. 7). The appellant stated to Mr. Brown that the decision in the Brand case was the true precedent case with regard to the appellant's case since both Brand and the appellant had appealed their terminations on the basis of having been erroneously left

in the unclassified service. The appellant also brought to Mr. Brown's attention the cases of State, ex rel. Trettien v. Mahon, 16 Ohio Law Abstract 33 (1934) and State, ex rel. Votaw v. Matia, 43 Ohio App. 279 (1932) which contained the same type of appeal as that of the appellant. In the Brand case and the above two cases, three different courts in Ohio received appeals from unclassified employees on the question of their unclassified status, and said appeals were based upon the civil service law as applied to classified employees. The appellant continued by stating to Mr. Brown that the action of the courts in the Brand, Trettien and Votaw cases was contrary to the decision of the Court of Appeals in appellant's case where the latter was denied the right to appeal to the Board on a question of his unclassified status under the civil service law of Ohio. Furthermore, the appellant stated to Mr. Brown that the Baker case was one of several civil service cases that were not applicable to the appellant's case since in each such case the appellant appealed on the basis of having somehow attained classified civil service status, usually by working at a job that was normally classified; but such appellants never complied with the statutory requirements for gaining such status. The courts rightly denied an appeal of that nature. Said cases are listed in a footnote on the last page. 2

But despite this examination of several civil service cases as presented to Mr. Brown and despite the latter's earlier statement that the Baker case was not applicable to the appellant's case, Mr. Brown made only a brief and illogical reference to the Baker case in appellant's memorandum in support of motion to certify to the Supreme Court of Ohio on about August 8, 1966 (p. 6). Contrary to that reference by Mr. Brown, Baker most certainly claimed that she had acquired classified civil service status and had done so by working at a job that was

normally classified. This was the only reference made by Mr. Brown to the substantive features of the decision of the Court of Appeals in the appellant's case even though he had earlier described that decision as having been in error.

The appellant brought up again with Mr. Brown the matter of going to the Supreme Court of the United States on about November 25, 1966, which was still prior to the oral hearing before the Supreme Court of Ohio (affidavit, #29, p. 7). And on about December 1, 1966, the appellant asked Mr. Brown to mention the significance of the Brand case (described above) to the appellant's case in the upcoming hearing before the Supreme Court of Ohio. Mr. Brown granted that it was a good point and agreed to mention it (affidavit, #30, p. 7). He did mention the subject at the hearing but in such a brief manner that it could hardly have been noted by the court (affidavit, #31, p. 7).

Although the following matter was not raised with Mr. Brown, he was most certainly aware of it and might well have brought it to the attention of the Supreme Court of Ohio. The appellee, the Ohio State University, filed with the Supreme Court of Ohio a memorandum opposing jurisdiction in opposition to the appellant's motion to certify, and in that memorandum the Assistant Attorney General, as attorney for the appellee, argued that the Board did not have a right to hear an appeal from an unclassified employee on the question of his unclassified status. Thus the Assistant Attorney General took a position contrary to that taken previously at the appellant's hearing before the State Personnel Board of Review; there, the right of the Board to hear the appelant's appeal on the question of his unclassified status was not disputed by the appellee.

Furthermore, on May 4, 1966, just one day after the Court of Appeals dismissed the appellant's appeal on the ground that the Board didnot have the right to hear an appeal from an unclassified employee on the question of his unclassified status, the Assistant Attorney General filed a brief of amicus curiae with the Supreme Court of Ohio in the Bingham case, cited above, in which a lengthy argument was presented in support of the right of the Board to hear an appeal from an unclassified employee on the question of his unclassified status. The appellant contends that such a shifting of position on a matter of great public importance is certainly unworthy of the Office of the Attorney General of Ohio and cannot be defended on the basis of the adversary system wherein the Assistant Attorney General was defending a client. Such contrary positions were most unusual on the part of the Assistant Attorney General and should have been brought to the attention of the Supreme Court of Ohio by Mr. Brown.

The Supreme Court of Ohio overruled the appellant's motion to certify on December 14, 1966. On about December 17, 1966 the Appellant supplied Mr. Brown with outlines for an appeal to the Supreme Court of the United States on the basis of denial of federal constitutional rights and an outline of a motion for rehearing to the Supreme Court of Ohio on the same basis (affidavit, #32, p. 7). On about December 18, 1966 the appellant learned quite by accident of the decision in the Crabtree case by the Court of Appeals, which was contrary to that same court's decision in the appellant's case (affidavit, #33, p. 8). The appellant thus began to prepare a motion for rehearing to the Supreme Court of Ohio based upon the denial of equal protection of the law (affidavit, #34, p. 8 and Statement of the Facts above).

Despite the fact that the appellant had again urged

Mr. Brown to prepare for an appeal to the Supreme Court of the United States and an appeal to the Supreme Court of Ohio for a rehearing (paragraph just above), Mr. Brown waited until noon of the deadline date for filing the motion for rehearing to mention for the first time to the appellant the matter of the Crabtree case and the recent decision in it by the Court of Appeals; Mr. Brown displayed no intention of using that decision as a basis for any future action or appeal (affidavit, #35, p. 8). The appellant immediately took the initiative and urged Mr. Brown to file a motion for rehearing with the Supreme Court of Ohio based upon denial of equal protection of the law as a result of the decision in the Crabtree case and presented him with a draft of such a motion. Mr. Brown did file said motion for rehearing that afternoon before the deadline; if he had not done so, the appellant would have filed the item which he had already prepared.

In replying to the motion for rehearing filed by Mr. Brown with the Supreme Court of Ohio, the appellee filed a memorandum contra motion for rehearing, and in this document two very serious errors were made with regard to the factual background in the Crabtree case. The erroneous statement is found on page 3 of the memorandum contra motion for rehearing as follows:

> Under date of January 12, 1950 the old Civil Service Commission pursuant to what is now Section 143.08 (A) (12), Revised Code, accomplished a transfer of the entire class of unskilled laborers including the above mentioned individuals (Crabtree et al.) from the classified service to the unclassified service. (Emphasis added.)

The above quotation is entirely erroneous.[3] The facts

of the matter are that Crabtree et al. were hired separately into the unclassified service as laborers several years after the 1950 action by the Civil Service Commission and that the laboring class in the Ohio civil service had been unclassified for years prior to 1950. The facts concerning the date of employment of Crabtree et al. and their unclassified status is recorded on their employment records in the Department of State Personnel, and the matter of the unclassified status of the laboring class in Ohio over the years as well as the unclassified status of Crabtree el al. is clearly stated by the Assistant Attorney General on pages 6, 8 and 9 of the Transcript of the hearing of the Crabtree case before the Board on March 12, 1964. The record of the Crabtree case is on file in the Franklin County Clerk of Court's Office.

In addition to making the above quoted erroneous statement, the appellee proceeded on the basis of that statement on page 3 to argue that the Crabtree case differed from the appellant's case in that Crabtree et al. had been in the classified service and never validly removed whereas the appellant had never been in the classified service. The objective was to prove that the decisions in the Knox and Crabtree cases were not contrary.[3]

The appellant's motion for rehearing was overruled by the Supreme Court of Ohio on January 11, 1967. The appellant believes that the Supreme Court of Ohio might possibly have overruled his motion for rehearing on the basis of the above factual errors and the argument based thereon.

In the face of such serious factual errors and the critical importance of the motion for rehearing to the appellant, still Mr. Brown made no effort to inform the Supreme Court of Ohio of said errors. Mr. Brown knew very well the factual background of the Crabtree case since he was

counsel for the appellants; he most certainly would have recognized such errors had he read the memorandum contra motion for rehearing submitted by the appellee. Whether Mr. Brown failed to read the memorandum or whether he read it and failed to take action really makes no difference since either failure would constitute negligence on his part.[3] Such negligence might possibly have resulted in the overruling of the appellant's motion for rehearing by the Supreme Court of Ohio.

About mid-February, 1967, Mr. Brown agreed to take the case to the Supreme Court of the United States on a contingency basis (affidavit, 36, p. 9), but he finally dropped out of the case only a few days prior to the ninety day deadline for filing the petition for writ of certiorari and did not inform the appellant of the latter's right to request a sixty day extension of the time for filing the petition (affidavit, #37, #38, p. 10).

CONCLUSION

As described above, the appellant clearly informed Mr. Brown on several occasions prior to the hearing before the Supreme Court of Ohio that he wished to appeal to the Supreme Court of the United States if necessary, but Mr. Brown made no effort to support the objective of the appellant by presenting the instances of denial of federal constitutional rights to that court in the memorandum in support of the motion to certify or at the hearing. Since Mr. Brown is a very capable and experienced attorney, such a failure cannot be excused as being an oversight; such a failure can only be described as a conscious error in judgment. The appellant contends that Mr. Brown substituted his attitude concerning the future of the case for that of the appellant. In such an instance of conflict of attitudes, Mr. Brown should have retired immediately

from the case rather than give only partial support to the appellant.

As a result of this failure on the part of Mr. Brown, the appellant contends that he has a right in terms of the basic principles of justice to appeal for a second time to the courts of Ohio in order to present the material contained under this cover.

Respectfully submitted,

Donald F. Knox
Appellant

FOOTNOTES

[1]The signatures of attorneys Robert T. Forman and John A. Brown appear on the memorandum in support of motion to certify to the Supreme Court of Ohio, but Mr. Brown was in complete charge of the case in that appeal (ref. p. 3).

[2]Jones v. City of Struthers, 19 Ohio Law Abstracts 155 (1935); State, ex rel. Lynch v. Taylor, Dir., 136 Ohio St. 417 (1940); State, ex rel. Stein v. Dept. of Highways, 136 Ohio St. 252 (1940); Taylor v. Johnson, Mayor, 172 Ohio St. 394 (1961) (ref. p. 12).

[3]Perhaps the Assistant Attorney General spoke of the "classified service" in a manner at variance with generally accepted usage (see "Motion that the Court Receive an Examination of the Identical Aspects of the

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing "Instances of Denial of Federal Constitutional Rights..." was mailed to Robert M. Zitko, Assistant Attorney General, State House Annex, Columbus, Ohio on the_____day of September, 1967.

_____
Donald F. Knox
Appellant

I certify that a copy of the foregoing "Instances of Denial of Federal Constitutional Rights..." was mailed to John A. Brown, Attorney at Law, 42 East Gay Street, Columbus, Ohio on the_____day of September, 1967

_____
Donald F. Knox
Appellant

3 (continued) Knox and Crabtree cases). Nevertheless, he still would have been in serious error, and Mr. Brown still would have been negligent. (ref. pp. 15-17).

FILED
SEP 18 19:7
JOHN F. DAVIS, CLER

NO. 283

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

APPENDIX C

ACCOMPANYING THE MOTION THAT THE REVIEW OF THE PETITION FOR WRIT OF CERTIORARI BE DELAYED

DONALD F. KNOX
Petitioner

vs.

THE STATE OF OHIO
Respondent

Donald F. Knox
127 W. Northwood Ave.
Columbus, Ohio

Petitioner

IN THE COURT OF APPEALS, FRANKLIN COUNTY, OHIO

In the Matter of the Appeal of Donald F. Knox : from a Decision of the : State Personnel Board of : Review

Case No. 8298

AFFIDAVIT

PRESENTED IN SUPPORT OF THE MOTION THAT THE DECISIONS OF THE LOWER COURTS BE REVIEWED

Donald F. Knox
127 W. Northwood Ave.
Columbus, Ohio

Appellant

William B. Saxbe
Attorney General
State of Ohio

Robert M. Zitko
Assistant Attorney General
State House Annex
Columbus, Ohio

Attorneys for Appellee

AFFIDAVIT

Now comes Donald F. Knox, the affiant herein and first being duly sworn and cautioned according to law states the following:

1. That on or about December 29, 1966, the affiant and his attorney, John A. Brown, 42 East Gay Street, Columbus, Ohio conferred by telephone regarding the recent hearing of affiant's appeal by the State Personnel Board of Review on December 1, 1964. Mr. Brown informed the affiant that the Office of the Attorney General had just raised the question as to whether the affiant would be willing to settle the dispute by negotiation and thus without a ruling by the Board. The affiant stated that he would consider the proposal and contact Mr. Brown within a few days. (Exhibit A).

2. That on or about December 30, 1964, Miss Theda Rippel, a clerk at the Information Desk at University Hospital, informed the affiant that her supervisor, Mrs. Leona S. Riedel, had informed her that the affiant would be returning to his former job and that Miss Rippel should attempt to recall derogatory information about affiant so that the University Hospital could fire him "legally" the next time.

3. That during the period from January 5, 1965 to January 11, 1965, the affiant conferred by phone and by letter with his attorney, Mr. Brown. Affiant states that he was confronted with the problem of needing the job while continuing his doctoral studies at Ohio State University since he had a large family and his wife's income was not sufficient. However, affiant feared that he would encounter harrassment by returning to that job, as was indicated in #2 above. Affiant also feared that his wife's position as evening nursing supervisor at University Hospital would be endangered if he should return to the job. Affiant's final decision as to the University's offer to negotiate was

made on January 11, 1965, at which time he instructed his attorney, Mr. Brown, to request a letter giving details of the termination and the right to return to the job in the future upon a vacancy occurring. Attorney Brown agreed to those terms. Affiant believed that such terms, if met, would protect him, in his effort to locate other campus employment, from a false charge by Mr. Harold Autrey, former Associate Administrator of University Hospital, that affiant had not given adequate attention to his duties as one of the chief night clerks. Affiant states that the actual reason for the termination was that he allowed about 115 employees to sign a paper registering their dissatisfaction with a certain change in policy.

4. That on or about January 14, 1965, Miss Theda Rippel, referred to in #2 above, informed the affiant that she had been told that the affiant would not be returning to his former position.

5. That on or about January 15, 1965, Attorney Brown sent a draft of a letter of recommendation to the University Hospital for consideration. Affiant states that he had no opportunity to review that draft.

6. That on or about January 27, 1965, Attorney Brown wrote to the affiant and informed him of the University's "final offer" and included a draft of a letter of recommendation which Mr. Harold Autrey had agreed to sign. Attorney Brown stated that affiant should accept the terms offered if he was at all interested in settling the matter by negotiation. Regarding those terms, the affiant states that Attorney Brown made no mention of affiant's request for the right to return to the job in the future upon a vacancy and that the proposed letter of recommendation in no way resembled a complete explanation of the termination as affiant had requested. The affiant states that he was quite disturbed by Attorney Brown's implication that the University would now be willing to have the Board rule whereas a month earlier the University was attempting to avoid such a ruling (Exhibit B).

7. That on or about January 28, 1965, the affiant phoned Attorney Brown and emphatically informed him that the affiant did not have to compromise on his terms since it was clear that the Board would rule in affiant's favor if a ruling became necessary. Attorney Brown accepted this interpretation without objection.

8. That on or about February 2, 1967, the affiant wrote to Attorney Brown and stated that he would be willing to discuss the matter of a more complete letter of recommendation with the Hospital Administration and that the back pay might cease as of January 31, 1965 if the offer to hold a discussion was accepted. The affiant also stated that the earlier request for the right to return to the job in the future should be dropped because affiant had been advised by another party that it was an unreasonable request, but affiant stated that the letter of recommendation would therefore have to be quite complete in terms of the details of the termination.

9. That on or about February 5, 1965 James R. Gould, then chairman of the State Personnel Board of Review, was appointed to the Ohio Board of Tax Appeals with the effective date of the appointment being February 9, 1965 and that Mr. Gould resigned from the Board effective February 8, 1965. The Affiant states that said information was obtained from Mrs. Hemrod of the Office of the Governor in a phone conversation. Furthermore, the affiant states that he had no knowledge of this change until about March 22, 1965.

10. That on or about February 12, 1965 Attorney Brown wrote to the Assistant Attorney General to inform him of the terms of affiant's latest offer (#8 above) and that the Board would be asked to render a decision if those terms were not met (Exhibit C).

11. That on or about February 11, 1965, Mr. Earl W. Allison, a member of the Board at the time of the hearing of affiant's appeal, was appointed chairman of said Board. This information was obtained from Mrs.

Hemrod (#9 above).

12. That during the period of February 12, 1965 to March 18, 1965, the affiant heard nothing from Attorney Brown regarding the proposal to the University as contained in the letter sent by Mr. Brown on February 12, 1965 (#10 above). Furthermore, affiant states that he had no knowledge during this period of there having been a change in the composition of the Board but had assumed that the Board which had heard his appeal and which had caused the University to ask for negotiations was still intact.

13. That on or about March 18, 1965 Attorney Brown phoned the affiant to inform him that the Attorney General had filed a motion to dismiss the affiant's appeal for reason that affiant had exercised an unreasonable length of time in bringing said appeal.

14. That on or about March 20, 1965 the affiant wrote to Attorney Brown and expressed great concern over the apparent willingness of the University to have the Board render a decision since the University had obviously tried to avoid such an action in offering to negotiate at an earlier date. Affiant states that he also reminded Attorney Brown of the comments made to Miss Rippel (#2 above) which indicated that the University had been informed that the Board planned to render a decision in favor of the affiant. Affiant states further that he requested Attorney Brown to supply the Board with information regarding the steps that affiant had taken from the time of job termination on May 14, 1964 until the appeal to the Board on October 9, 1964.

15. That on or about March 21, 1965 the affiant conferred with Attorney Brown by phone and was told by the latter that it would not be necessary to offer such information to the Board (#14 above) in view of the fact that the affiant had stated at the hearing that he had appealed as soon as he had learned of his right of appeal. The affiant agreed with Attorney Brown that this was theoretically

correct and did not press the matter further.

16. That on or about March 22, 1965 the affiant learned for the first time from another source other than Attorney Brown that Mr. Gould had departed from the Board (#9 above).

17. That on or about March 23, 1965 the affiant phoned Attorney Brown concerning the change in the Board's composition and was told that the change might work in favor of the employees.

18. That on or about April 11, 1965, following the Board's dismissal on April 9 of affiant's appeal, the affiant mailed to Mr. Allison, the new chairman of the Board, a summary of the steps that the affiant took from the time of job termination up till the appeal to the Board.

19. That on or about April 13, 1965 the affiant wrote to Attorney Brown and asked that he talk with Mr. Allison about the available evidence, which the affiant had just presented to Mr. Allison (#18 above), that refuted the charge of unreasonable delay and about the possibility of a rehearing.

20. That on or about April 15, 1965 Attorney Brown phoned Mr. Allison according to the affiant's request (#19 above).

21. That on or about April 21, Attorney Brown spoke in person with Mr. Allison, the chairman of the Board, concerning the affiant's request for a rehearing, but made no progress in the request.

22. That on or about April 27, Mr. Allison, Chairman of the Board, wrote to the affiant in reply to the summary sent to him of steps taken by the affiant prior to his appeal to the Board (#18 above). Mr. Allison rejected the request for rehearing and implied therein that the affiant had falsified a portion of the information that had been presented to Mr. Allison (Exhibit D).

23. That on or about June 13, 1965 Attorney Brown was dismissed from the case.

24. That on or about May 8, 1966, the day the Franklin County Court of Appeals dismissed the affiant's appeal,

the affiant visited Attorney Brown and was told that the latter regarded the decision of the Court of Appeals as being in error and that the precedent case, upon which the court had based its decision, was not an applicable one in affiant's case.

25. That on or about May 12, 1966 Attorney Brown and the Ohio Civil Service Employees Association, for whom Mr. Brown was counsel, agreed to appeal the adverse ruling in the affiant's case to the Supreme Court of Ohio because said decision had stated that an employee carried in the unclassified service did not have a right to bring the question of his unclassified status before the State Personnel Board of Review. Attorney Brown was to be paid by the OCSEA if the appeal was lost and by the affiant if the appeal was won.

26. That on or about May 25, 1965 the affiant informed Attorney Brown in a phone conversation that he wanted to take the case to the Supreme Court of the United States if it was lost in the Supreme Court of Ohio. Attorney Brown asked on what basis such an appeal might be made, to which the affiant reminded him of the various instances of denial of federal constitutional rights that had occurred at each preceding stage in the case.

27. That on or about June 2, 1966 the affiant wrote to Attorney Brown and raised a question concerning the possible relationship that the pending decision in the Supreme Court of Ohio in the case of State, ex rel. Bingham v. Riley, County Eng., 6Ohio St. 2d 263 might have to affiant's case. Affiant stated that he believed that if the Supreme Court of Ohio should sustain the appeal in the Bingham case, as had been presented by Attorney Brown, then that action would, in effect, overrule the decision of the Court of Appeals in the affiant's case. In reply, Attorney Brown stated that the affiant was in error in above stated theory because the appeal in the Bingham case stated that the decision of the Board was res judicata and thus did not touch upon the question as to whether or not the Board had a right to

hear an appeal from an unclassified employee (Exhibit E).

28. That on or about June 13, 1966 the affiant wrote to Attorney Brown and presented to him, among other matters, a comparison of State, ex rel. Baker v. Wichert, Mayor, 159 Ohio St. 50 (1953), on which the Court of Appeals had based its decision in the appellant's case, to other civil service cases and thus analyzed the inapplicability of the Baker case to appellant's case, Mr. Brown had stated earlier that the Baker case was not applicable to appellant's case (#24 above). (Exhibit F.)

29. That on or about November 25, 1965, still prior to the hearing before the Supreme Court of Ohio, the affiant had lunch with Attorney Brown and initiated a discussion concerning the possibility of going to the Supreme Court of the United States if necessary. Attorney Brown spoke of the costliness of such action. No final decision was made on the proposition.

30. That on or about December 1, 1966 the affiant phoned Attorney Brown and asked that he mention in the upcoming oral hearing before the Supreme Court of Ohio the significance of the decision in the case of State, ex rel. Brand v. Eversman, 155 Ohio St. 383 with respect to the dismissal of the affiant's appeal by the Court of Appeals. Affiant's point was that the fact that the court reviewed Brand's appeal was contrary to the decision of the Court of Appeals in the affiant's case. Affiant states that Attorney Brown agreed to mention the matter at the oral hearing since he considered it a good point.

31. That on or about December 8, 1966 at the hearing before the Supreme Court of Ohio, Attorney Brown made only a very slight reference to the decision in the Brand case (#30 above).

32. That on or about December 17, 1966, following the overruling of the affiant's motion to certify by the Supreme Court of Ohio, the affiant sent to Attorney Brown an outline of a proposed petition for certiorari to the Su-

preme Court of the United States and a proposed motion for rehearing to the Supreme Court of Ohio. Both outlines were based upon the denials of federal constitutional rights in the lower courts and upon the affiant's contention that the Supreme Court of Ohio, overruling his motion to certify, allowed the decision of the Court of Appeals in affiant's case to stand in contradiction to the decision of the Supreme Court of Ohio in the Bingham case (#27 above) (Exhibit G).

33. That on or about December 18, 1966 the affiant learned quite by accident that the Franklin County Court of Appeals had rendered a decision on December 13, 1966 in the Matter of the Appeal of John L. Crabtree et al. from a Decision of the State Personnel Board of Review, Case No. 8430-35, which was contrary to the decision of the same court in the affiant's case. Furthermore, the affiant states that he had to learn of said Crabtree case and the decision in said case quite by accident despite the fact that his attorney, Mr. Brown, had been the attorney for the appellants in the Crabtree case all along and despite the fact that said decision in the Crabtree case was of vital importance with regard to the affiant's case.

34. That during the period from December 18 to 27, 1966 the affiant proceeded to prepare a motion for rehearing based upon the contrary decisions in the Knox and Crabtree cases arising in the Court of Appeals. Furthermore, affiant states that he was attempting to meet with Attorney Brown at lunch in order to see if the latter would bring up the matter of the Crabtree decision and would file for rehearing based upon it.

35. That on or about December 27, 1966, which was the deadline for filing a motion for rehearing in the Supreme Court of Ohio in the affiant's case, the affiant and Attorney Brown met for lunch. The latter immediately made mention of the Crabtree case for the first time and the affiant informed him of his having read the decision.

Both parties immediately agreed that the latter was contrary to that by the same court in the affiant's case. Furthermore, the affiant proposed that a motion for rehearing be filed as a result of said contrary decisions and that it be stated that the affiant had been denied equal protection of the law. Attorney Brown expressed doubt about the effectiveness of said motion but received the draft that affiant had prepared and filed the motion for rehearing before the 5:00 p.m. deadline that day. This latter motion was overruled on Jaunary 11, 1967.

36. That on or about February 15, 1967 the affiant was finally able to meet Attorney Brown at lunch and discuss an appeal to the Supreme Court of the United States. The latter agreed to represent the affiant on a contingency basis without raising any objections. Furthermore, the affiant states that he again raised the question of the relationship of the decision of the Supreme Court of Ohio on June 15, 1966 in the Bingham case to the decision of the Court of Appeals in the affiant's case. When the question had been asked earlier (#27 above), Attorney Brown stated that there would be no relationship between the affiant's case and an opinion from the Supreme Court of Ohio in favor of the appellants in the Bingham case. Furthermore, the affiant states that, with regard to the decision favorable to the appellants in the Bingham case as rendered by the Supreme Court of Ohio on June 15, 1966, Attorney Brown at this luncheon meeting, finally agreed with the affiant that it could be argued that the latter decision did relate to the decision of the Court of Appeals in the affiant's case in that it affirmed the right of the Board to hear an appeal from an unclassified employee on the question of his unclassified status, which is exactly what had been denied by the Court of Appeals in the decision in the affiant's case.

37. That on or about March 25, 1967, the affiant wrote to Attorney Brown in order to inquire about the progress in preparing the appeal since the ninety day

deadline was April 11, 1967.

38. That on or about April 5, 1967, only a few days prior to the ninety day deadline for filing the petition, Mr. Brown wrote the affiant and informed him that he would not be able to proceed with the appeal to the Supreme Court of the United States due to pessimism regarding the possibility of success of said appeal and the pressure of other duties. Also, he did not inform the appellant of the right to request a sixty day extension. (Exhibit H)

Thus concludes the affiant.

_____
Donald F. Knox
Affiant

Sworn to before me and in my presence this_____day of September, 1967.

_____
M. B. Fox
Notary Public

My commission expires March 20, 1972.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing "Affidavit" was mailed to Robert M. Zitko, Assistant Attorney General, State House Annex, Columbus, Ohio on the_____ day of September, 1967.

_____
Donald F. Knox
Appellant

I certify that a copy of the foregoing "Affidavit" was mailed to John A. Brown, Attorney at Law, 42 East Gay Street, Columbus, Ohio on the_____day of September, 1967.

_____
Donald F. Knox
Appellant

SUPREME COURT, U. S.

NO. 283

Office-Supreme Court, U.S.
FILED
SEP 18 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

A MOTION THAT THE COURT RECEIVE A BRIEF SUMMARY OF THE PROCEDURAL AND SUBSTANTIVE ISSUES IN THE CASE AND THE RELATIONSHIP OF THE LATTER ISSUE TO THE BRAND CASE

DONALD F. KNOX
Petitioner

vs.

THE STATE OF OHIO,
Respondent

Donald F. Knox
127 W. Northwood Ave.
Columbus, Ohio

Petitioner

MOTION

The several appeals of the petitioner have been successively rejected for procedural reasons. The State Personnel Board of Review rejected the appeal for reason of laches; the Common Pleas Court based its decision on an inapplicable section of the Revised Code, and the Court of Appeals dismissed the appeal for reason that the Board had no right to hear an appeal from an unclassified employee. The Supreme Court of Ohio refused to hear the case on the merits.

The substantive question has never been decided (the decision of the Common Pleas Court has no validity in law) and has been reviewed only at the hearing before the Board. That question was whether or not Knox had been improperly carried in the unclassified service which in turn was based upon the question as to whether or not Knox could have been considered an administrative officer as based upon Section 143.08 (A) (7), Revised Code. Such a question can be answered in the petitioner's case without interpreting the meaning of the term "administrative officer" in paragraph (7), cited above.

The Supreme Court of Ohio stated in the case of State, ex rel. Brand v. Eversman, 155 Ohio St. 383 (p. 388) that a person "who assists the business manager in an important supervisory capacity" is an administrative officer. Brand had claimed that his duties were not of such a high level so as to be covered under that term. By relating the testimony in the transcript of the Knox hearing before the Board to the decision in the Brand case, it is apparent that Knox was not an administrative officer and thus was entitled to classified status. The process of interpreting the law has been accomplished by the Supreme Court of Ohio.

Respectfully submitted,

Donald F. Knox, Petitioner

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NO. 283

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

A MOTION THAT THE COURT RECEIVE INFORMATION ON CERTAIN AMBIGUOUS AND ERRONEOUS STATEMENTS CONTAINED IN TWO BASIC DOCUMENTS IN THE RECORD

DONALD F. KNOX
Petitioner

vs.

THE STATE OF OHIO
Respondent

Donald F. Knox
127 W. Northwood Ave.
Columbus, Ohio

Petitioner

MOTION

The petitioner requests that the Court receive the accompanying comparison of the factual backgrounds of the respective appeals of John L. Crabtree et al. and Donald F. Knox to the State Personnel Board of Review. The importance of this comparison rests upon the petitioner's finding that certain erroneous statements were made with regard to the background of the Crabtree case by the appellee in the Memorandum Contra Motion for Rehearing to the Supreme Court of Ohio. The object of said Memorandum was to prove that the petitioner could not have rightly claimed that the decisions in the above two cases were contrary and consequently could not have claimed a denial of equal protection of the law. Furthermore, the petitioner's former attorney made no effort to bring this matter to the attention of the Supreme Court of Ohio.

Also, the petitioner notes that there are certain ambiguous statements contained in the decision of the Court of Appeals of Franklin County, Ohio in the petitioner's case which may relate to the above problem.[1]

The petitioner believes that the above matter, as contained in those two basic documents in the record of this case, constitutes a serious problem in the consideration of petitioner's case by this Court. Therefore, the petitioner requests a review of the matter.

Respectfully submitted,

Donald F. Knox
Petitioner

[1] That decision is contained in the Appendix B to the Petition for Writ of Certiorari, under the cover entitled "Appendixes."

A COMPARISON

OF THE

KNOX AND CRABTREE CASES

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CLARIFICATION OF THE TERMINOLOGY

The objective of this analysis by the appellant-petitioner Knox is to demonstrate that the appellee was in error in the Memorandum Contra Motion for Rehearing to the Supreme Court of Ohio wherein an attempt was made to distinguish between the appeals of Knox and Crabtree to the State Personnel Board of Review. Furthermore, it will be demonstrated that the appellee presented ambiguous and erroneous statements in pursuing such an effort.

Since certain ambiguities will be encountered in the Memorandum cited above, it is necessary first of all to present an explanation of the two different meanings attached to the term "classified service". The most obvious and widely used meaning is that a person in the classified service is one who has a designation on his personnel record and thus falls under the regulations and protection regarding job tenure as provided by such status. Such a person for purposes of this analysis will be spoken of as being "formally" in the classified service. Another meaning of the term refers to an employee who, although not "formally" carried in the classified service, works at a job that <u>should be</u> "formally" carried in the classified service on the basis of a specific section of the Revised Code of Ohio. Such an employee has for some reason not been "formally" placed in the classified service and will be described as being "in essence" a classified employee as an indication that he should be "formally" classified.

The fundamental basis for comparison of the two cases is to be found in the transcripts of the respective hearings before the State Personnel Board of Review. The transcript in the <u>Knox</u> case indicates that Knox was not formally classified since he had been hired into the

unclassified service (p. 4). However, Knox maintained at that hearing that he was in essence a classified employee, meaning that he should have been classified; the appellee opposed that claim. The basis of Knox's claim to being in essence a classified employee was that his job as one of the three chief night clerks at University Hospital of Ohio State University could not be considered as falling within any category listed in paragraph (7) of Section 143.08 (A), Revised Code wherein was listed those categories of employees in educational institutions that might be excluded from the classified service. The Board and the appellee agreed with Knox's position that he should be returned to his job if the Board should find that he was in essence a classified employee and thus improperly carried in the unclassified service (transcript, pp. 36-37). In other words, all parties fully accepted the theory that an unclassified employee who claims that he is in essence a classified employee has a right to appeal the question of his unclassified status to the Board.

AN ANALYSIS OF THE CRABTREE CASE

Turning next to the Crabtree case, it is necessary to present the facts and law that are basic to that case. Crabtree and five others were hired into the unclassified service in the period of 1956-62 by the Department of Natural Resources as unskilled laborers and thus designated as Laborer I and II in the classification system as indicated on their personnel records. They were dismissed from their jobs in early 1964 without regard to the procedure required in terminating classified employees; an appeal was brought before the Board on March 12, 1964 on the basis that they were in essence classified employees and had been denied protection of the civil service law in the matter of their dismissals. They requested a return to their jobs and back pay.

The controlling sections of the Revised Code of Ohio in the Crabtree case were 143.08 (B) (2) and 143.08 (A) (12). Section 143.08 (B) states that the classified service includes the competitive class and the unskilled labor class and paragraph (2) states that the "unskilled labor class shall include ordinary unskilled laborers" and then continues to describe the procedure by which such workers are to be tested and appointed. Section 143.08 (A) lists the positions within the state civil service that may be left in the unclassified service, and paragraph (12) refers to laborers with the statement that "such unskilled labor positions as the director of state personnel... may find it impracticable to include in the competitive classified service provided such exemptions shall be by order of the commission or director, duly entered on the record... with the reasons for each such exemption..."

At the hearing of the Crabtree case before the Board the objective of the appellee (the Department of Natural Resources) was to demonstrate that the Civil Service Commission (the predecessor in terms of office and function of the present Department of State Personnel and the State Personnel Board of Review) had validly removed the entire unskilled labor class from the classified service in 1923 and that said policy had been sustained right up to 1964 on the basis of Section 143.08 (A) (12), Revised Code. The appellants claimed that said effort was illegal since it was not in conformity with the terms of the statute just cited above.

The Board found that the Civil Service Commission had validly removed the entire labor class from the classified service by several actions over the years beginning in 1923 and on that basis decided that Crabtree et al. did not possess the quality of being classified employees in essence and thus did not have a right of appeal to the Board on

the further question of the legality of their dismissals. There was no disputing the fact that they were unclassified, formally speaking; the dispute was with regard to whether or not they should have been carried in the classified service, and the Board decided to the contrary.

The above is essential background information relative to the question of whether or not the Knox and Crabtree cases were identical upon their respective appeals to the Board; the appellant-petitioner believes that the question could be settled in his favor upon the above information only if it were not for certain ambiguous and outright erroneous statements contained in the record of the two cases. As a result, the matter must be examined further.

At the hearing of the Crabtree appeal before the Board, testimony was read into the record from the minutes of the Civil Service Commission in order to determine just what had been the state policy over the years regarding the labor class. In separate instances in 1923 1930, and 1941 the Commission supplied reasons for excluding a major segment of the labor class from the classified service and in each instance used a specific hourly wage rate as the demarcation point between the classified and unclassified employees (pages 14-18). In 1950 the Commission stated only that "it would be impractical at this time to include such unskilled labor positions in the competitive classified service" and did not provide for any classified laborers (p. 13).

Testimony was received from the Assistant Director of the Department of State Personnel regarding the classification of the labor class over the years; he stated that all laborers were in the unclassified service at that time and that such a policy had been in effect "for many, many

years..." (p. 23). In an argument presented by the Assistant Attorney General, the latter stated that total exclusion of the labor class from the classified service was a policy that went back to the action in 1923 by the Commission (p. 8). At a later point the latter stated that the wage rates used by the Commission in 1923, 1930 and 1941 were the actual hourly wages paid to unskilled laborers at the time, with the purpose being to distinguish wholly unskilled laborers from those with some special skills as a result of there being no job classification system at that time (p. 23). His point evidently was that the Commission placed all totally unskilled laborers in the unclassified service and allowed those with some special skill as reflected by a higher wage rate to remain in the classified service.

In summary, the transcript clearly demonstrates that a large segment of the labor class was carried in the unclassified service from 1923 to 1967 as a result of specific acts of the Commission in 1923, 1930, 1941 and 1050; furthermore, the Assistant Director of the Department of State Personnel testified that the entire labor class had been unclassified for "many, many years...." (p. 23).

A CONSIDERATION OF THE DECISION OF THE COURT OF APPEALS IN THE CRABTREE CASE

Before proceeding to the principle objective of the analysis, the appellant-petitioner believes that it would be of value to inspect certain sentences contained in the decision of the Court of Appeals in the Crabtree case. In certain instances it appears that the Court was saying that the entire labor class, including Crabtree et al., was removed for the first time from the classified service by the 1950 action of the Civil Service Commission, which

of course was not the case. The transcript would seem to indicate that most if not all of the labor class was unclassified as far back as 1923 and that the 1950 action merely sustained the previous policy. At the middle of page 3 of that decision there is the statement that the "motion of the Attorney General was supported by evidence designed to show that the former employees were removed from the classified service by an action of the former Civil Service Commission under date of January 12, 1950. ..." Such of course is not the case. First of all the former employees were hired into the unclassified service several years after the 1950 action. Secondly, the Assistant Attorney General emphasized that the exclusion of the labor class from the classified service was a policy originating in the 1923 action of the Commission (p. 8 of the Transcript). Next, there is the sentence at the bottom of page 7 of the Decision in which it is stated with reference to the 1950 action of the Commission that "The next result of such an order is to exclude all unskilled laborers in the state service from the protection of the civil service statutes. ..." The statement is accurate in one sense, but it could be easily misinterpreted to mean that the Commission in 1950 affected a change in policy, which was not the case. Also, at the bottom of page 5 there is the phrase "removal of the unskilled laborers from the classified service was by act of the former Civil Service Commission" which, although technically correct, could be misinterpreted to mean that the Commission did that for the first time in 1950. As stated above, the transcript seems to demonstrate that the exclusion took place as far back as 1923.

In the same decision there are other sentences that indicate that the Court agrees with the Assistant Director of the Department of State Personnel whose testimony

indicated that the policy of an unclassified labor class extended back many years prior to the 1950 action by the Commission.. Such sentences appear at the very bottom of page 5 and continue onto page 6, at the middle of page 6 where the court paraphrases the contents of the minutes of the 1950 action and uses the phrase "impractical to include ..." (emphasis added), and in the top half of page 9 where the court appears to agree with the statement of the Assistant Attorney General regarding the labor class being unclassified as far back as 1923.

The consideration just above of the decision of the Court of Appeals in the Crabtree case has immediate relevance to the principal objective of this entire analysis in that the Memorandum Contra Motion for Rehearing of the appellee, which the appellant-petitioner maintains is in error, proceeded on the basis of that decision.

THE ERRORS CONTAINED IN THE MEMORANDUM CONTRA MOTION FOR REHEARING OF THE APPELLEE

The background of the immediate problem is as follows. On December 14, 1966 the Supreme Court of Ohio overruled the motion for rehearing in the Knox case. On the preceding day, December 13, 1966, the Court of Appeals of Franklin County, Ohio rendered a decision in the Crabtree case in which the appeal of the appellants was remanded to the Board for a decision on the merits of the dismissal. Such action most certainly affirmed the right of an unclassified employee to bring before the Board a question of his unclassified status on the basis that he was in essence a classified employee. But that same court had rendered a decision in the Knox case on May 3, 1966 wherein it was stated that an unclassified employee did

not have such a right. As a result of the above cited decision in the Crabtree case, the appellant-petitioner filed a motion for rehearing with the Supreme Court of Ohio based upon contrary decisions in the Knox and Crabtree cases and upon the resulting denial of equal protection of the law. That motion was also overruled.

The appellee filed in opposition to the motion for rehearing a Memorandum Contra Motion for Rehearing in which it was claimed that the two decisions in the two cases were not contrary due to the presence of different fact situations. With that position the appellant-petitioner emphatically disagrees. In passing judgment on this question raised by the appellee, there are only three factors that must be considered. The first factor is that the Court of Appeals in the decision in the Knox case stated only that an unclassified employee had no right of appeal to the Board on the question of that unclassified status; the court could only have been speaking of the formal classification of appellant Knox since the decision contained absolutely no discussion of the question as to whether or not Knox should have been in the classified service, i.e. whether or not he was in essence a classified employee. The second factor is that both Knox and Crabtree et al. were unclassified employees, formally speaking, who appealed to the Board on the basis that they were in essence classified employees and had been terminated without protection of the civil service law. The third factor is that the Court of Appeals upheld the right of Crabtree et al. to do the very thing that was denied to Knox. Since Knox and Crabtree were in identical positions upon their appeals to the Board with respect to the contents of the decision by the Court of Appeals in the Knox case and since that Court allowed a right to Crabtree that was denied to Knox, then those two decisions by said court

in the Knox and Crabtree cases stand as being contrary and thus constitute a denial of equal protection of the law.

The Court of Appeals said only that a formally classified employee had no right to appeal a question of his status to the Board; that decision contained no other factor relating to the background of appellant Knox. A consideration of the question of whether the decisions in the two cases were contrary or not must be made against that limited statement and that only. An effort to introduce any other factors cannot possibly be justified.

With the above argument as a background, the appellant-petitioner presents the following analysis of the statements and argument presented by the appellee in the Memorandum Contra Motion for Rehearing in opposition to appellant-petitioner's claim that he was denied equal protection of the law. The following statements were made on page 3 of the Memorandum.

First quotation:

> Under date of January 12, 1950 the old Civil Service Commission pursuant to what is now Section 143.08 (A) (12), Revised Code, accomplished a transfer of the entire class of unskilled laborers including the above mentioned individuals from the classified service to the unclassified service. Subsequently, these individuals were terminated from their positions, and appealed to the State Personnel Board of Review. . . .

Second quotation:

> What the court was saying (reference to the Court of Appeals) in effect was that the positions in the Crabtree case had never been validly removed from the classified service and the em-

ployees were therefore in the classified service at the time of their appeal to the State Personnel Board of Review.

In the instant matter Appellant Knox had not been, nor was he ever, vested with classified status.

The statements of fact as contained in the above quotations will be considered first of all, with a discussion of the appellee's argument following at a later point.

In considering the intent of an author it is only reasonable to proceed at the outset on the basis of the commonly accepted usages of the words of the author. So in this instance, and with the above analysis of the term "classified service" in mind, one would interpret the first quotation to mean that on January 12, 1950 the Commission transferred all the unskilled laborers, including Crabtree et al. from their positions in the classified service, formally speaking, to the unclassified service. Following that act, the appointing authority terminated Crabtree et al., and the latter appealed to the Board on March 12, 1964. Such an interpretation would be completely erroneous, but that is how the passage would normally be interpreted. The actual facts are that the Commission did not affect a change in policy as of 1950 and that Crabtree et al. were hired into the unclassified service several years following the 1950 action of the Commission.

Proceeding to the second quotation above, one would interpret it (on the basis of the first quotation) to mean that the Court of Appeals stated in its decision in the Crabtree case that the positions held by Crabtree et al. had not been validly removed from the classified

service by the action of the Commission in 1950. With such an interpretation, the errors concerning the action of the Commission and the date of employment and unclassified status of Crabtree et al. would be repeated and would utilize the decision of the Court of Appeals in support of such errors.

The final sentence in the second quotation was correct only if intended to convey the generally accepted usage of the term classified, i.e. Knox was never formally in the classified service. However, Knox claimed that he was in essence a classified employee.

In the face of such flagrant errors that flow from an interpretation based upon the generally accepted usage of the terms, the appellant-petitioner, for purposes of further analysis, can only rephrase the above quotations in order to present a thought pattern that might have been in the mind of the author of those passages but which certainly did not carry through into print. But even on the basis of such a re-casting of the material, they still will be in error.

Considering the first quotation and employing the facts as the appellant-petitioner interprets them on the basis of the transcript of the hearing before the Board in the Crabtree case and employing the two meanings of the term "classified service," the appellee may have intended to say the following, which is indented for ease of location.

First paraphrase:

> The Commission in 1950 sustained a long established policy of carrying the unskilled laborers in the unclassified service, which began in 1923 when the quality of being in es-

> sence classified employees was legally withdrawn (so regarded until corrected by the decision of the Court of Appeals). Furthermore, Crabtree et al. were hired into the unclassified service in the years following the 1950 action of the Commission on the basis of that long established policy. The latter were terminated from their jobs in 1964 and appealed to the Board on the basis that the positions they had held should have been formally classified because the quality of being in essence classified employees had never been legally withdrawn from the labor class by the earlier actions of the commission.

Such a paraphrase conveys an accurate picture of the facts. The Board and the Common Pleas Court decided that the Commission had acted legally in withdrawing the quality of being in essence classified employees from the labor class and thus denied a further appeal on the merits of the dismissal. The Court of Appeals held that said quality had not been legally withdrawn and thus remanded the case to the Board for a hearing on the merits of said dismissal.

The following is a paraphrase of the second quotation above (but excludes the last sentence).

Second paraphrase:

> What the Court was saying in effect was that the quality of being in essence in the classified service had never been withdrawn from the labor class by the prior actions of the Commission with the result that Crabtree et al., who had

been hired into the unclassified service in the years following said actions by the Commission, were in essence classified employees at the time of their appeal to the Board.

The above paraphrase is the only correct interpretation of the bulk of the second quotation. There can be no question about the fact that Crabtree et al. were unclassified employees, formally speaking, upon their appeals to the Board.

This leaves the last sentence of the second quotation above to be considered in conjunction with the appellee's argument that the appeals of Knox and Crabtree et al. to the Board were dissimilar. There the attempt was made to portray Crabtree et al. as having classified status at some time and which (to use the words of the appellee) "had never been validly removed" whereas Knox had never possessed one bit of classified status (see last sentence of second quotation). And it was upon that statement that the appellee based the alleged distinction between the Knox and Crabtree cases. But such a distinction is not possible in law nor fact.

The facts are that Crabtree et al. and Knox did not have classified status, formally speaking, at the time of their appeals to the Board; all that both parties were able to claim was that they possessed the quality of being in essence classified employees and it was therein that their appeals to the Board were identical. But in the face of those facts the appellee in the Memorandum to the Supreme Court of Ohio made a statement of fact in which it was claimed that Crabtree et al. did have classified status but that Knox did not have such at the time of their respective appeals to the Board. The appellee was in serious error in making such an assertion in the form of

a statement of fact to the Supreme Court of Ohio or any court. Furthermore, in terms of law, only the Board or a court can decide that any particular litigant does not have the quality of being in essence a classified employee, which was all that Crabtree et al. could possibly have claimed. Nevertheless, the appellee in a statement of fact asserted that Crabtree et al. had that quality whereas Knox did not.

The appellee certainly cannot defend the above error on the basis that he was speaking of Crabtree et al. as never having lost the quality of being in essence classified employees and at the same time speaking of Knox as never having been formally classified. Such an error in logic would be most flagrant, for the appellee had to be consistent in the usage of the term "classified" in referring to the two parties.

Nor could the appellee proceed to argue that since a portion of the labor class had formal classified status at one time (although such cannot be proven) and since Knox's position was never formally classified, then a distinction can be based thereon. But such is untenable. The fact that the labor class was illegally removed by a positive act from the classified service whereas Knox was denied classified service by the negative act of failing to include the chief night clerks in the classified service according to law is not a distinction; both the positive act of exclusion and the negative act of failing to take the proper action are equally illegal and grant no favored position to a group of formally unclassified employees many years later with respect to another formally unclassified employee.

CONCLUSION

The appellant-petitioner maintains that the above analysis and arguments thoroughly disprove the erroneous statement of fact and the argument based thereon as presented by the appellee in the Memorandum Contra Motion for Rehearing to the Supreme Court of Ohio for the purpose of proving that the Knox and Crabtree appeals to the Board were not identical. Those appeals were identical, but one was declared to be outside the law whereas the other was allowed, thus constituting contrary decisions and denial of equal protection of the law by the Franklin County Court of Appeals.

Respectfully submitted,

Donald F. Knox
Appellant-Petitioner

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing comparison of the Knox and Crabtree cases was mailed to Robert M. Zitko, Assistant Attorney General, State House Annex, Columbus, Ohio on the ____ day of September, 1967.

Donald F. Knox
Appellant-Petitioner

I certify that a copy of the foregoing comparison of the Knox and Crabtree cases was mailed to John A. Brown, Attorney at Law, 42 East Gay Street, Columbus, Ohio on the _____ day of September, 1967.

Donald F. Knox
Appellant-Petitioner

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NO. 283

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

A MOTION THAT THE COURT RECEIVE INFORMATION ON A RECENT DECISION IN THE SUPREME COURT OF OHIO

DONALD F. KNOX
Petitioner

vs.

THE STATE OF OHIO
Respondent

Donald F. Knox
127 W. Northwood Ave.
Columbus, Ohio

Petitioner

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MOTION

The petitioner respectfully requests that the Court receive information concerning a decision in the Supreme Court of Ohio on May 17, 1967 in the Matter of the Appeal of John L. Crabtree et al. from a Decision of the State Personnel Board of Review. The appellant did not know about the decision in time to cite it in the Petition.

MEMORANDUM IN SUPPORT OF MOTION

The decision of December 13, 1966 in the Crabtree case by the Court of Appeals of Franklin County, Ohio was cited in the Petition (p. 6). On the following day, December 14, 1966, the Supreme Court of Ohio overruled petitioner's motion to certify. A motion for rehearing was then filed with the latter court based upon the denial of equal protection of the law resulting from the above cited decision in the Crabtree case by the Court of Appeals since the latter decision was believed contrary to the decision by the same court on May 3, 1966 in the petitioner's case. The motion for rehearing was overruled, and an appeal was made to this Court.

The Court of Appeals had held on May 3, 1966 that the petitioner, having been an unclassified employee, had no right to bring before the State Personnel Board of Review the question as to whether or not he had been improperly carried in the unclassified service and thus dismissed the appeal. But in the Crabtree case, the same court on December 13, 1966 remanded the case of several unclassified employees to the Board for reason that they should have been carried in the classified service and thus should have had an opportunity to appeal to the Board on the merits of their dismissals. In that manner, the Court of Appeals affirmed said right of an unclassified employee which it

had denied to the petitioner.[1] The Board and the Common Pleas Court had earlier recognized such a right by hearing the appeal on the question of the appellants' unclassified status but had dismissed it for the reason that the appellants had been correctly carried in the unclassified service and thus had no right to appeal further on the merits of their dismissal.

On May 17, 1967 the Supreme Court of Ohio, as cited above, overruled a motion to certify in the Crabtree case that had been filed by the appellee, the Department of Natural Resources, in opposition to the decision of the Court of Appeals of December 13, 1966. As a result, the entire laboring class was transferred to the classified service from which they had been illegally excluded for over forty years.[2]

As a result of this recent decision of the Supreme Court of Ohio in the Crabtree case, the earlier decision of the Court of Appeals in the same case was allowed to stand and said right of an unclassified employee to appeal the question of his unclassified status was more firmly supported. The Supreme Court of Ohio obviously does not affirm every decision of the lower court upon overruling an objecting motion to certify, but such would seem the case in this instance in which the decision of the Court of Appeals in the Crabtree case was of such great public importance. The Court ruled as it did because it supported the decision of the Court of Appeals and the theory contained therein regarding said right of an unclassified employee.[3]

In concluding this motion, the petitioner wishes to inform the Court that there was an earlier decision

by the Supreme Court of Ohio on June 15, 1966 that also in effect overruled the decision of May 3, 1966 by the Court of Appeals in the petitioner's case. That decision was in the case of State, ex rel. Bingham v. Riley, County Eng., 6 Ohio St. 2d 262 wherein twenty-one unclassified employees appealed their dismissals to the State Personnel Board of Review on the basis they had been improperly left in the unclassified service and were thus denied protection of the civil service law in the matter of their dismissals. The Board found that they should have been in the classified service and ordered that they be returned to their jobs with back pay. The appellee then appealed untimely and to the wrong common pleas court, with the appeal being dismissed. The appellee continued to ignore the Board's order, and the appellants sought a writ of mandamus in the Court of Appeals of Lake County, Ohio.

The latter court on December 13, 1965 sustained the appellee's demurrer and denied the writ for the reason that the appellants had been in the unclassified service and had no right to bring before the Board the question of their unclassified status, based upon Section 143.012, Revised Code and upon State, ex rel. Baker v. Wichert, Mayor, 159 Ohio St. 50 (1953) which were the identical grounds upon which the Court of Appeals of Franklin County, Ohio dismissed the petitioner's appeal on May 3, 1966.[4] The appellants then appealed to the Supreme Court of Ohio, and that court on June 15, 1966 ordered that the writ of mandamus be issued for reason that the order of the Board was res judicata and not subject to the collateral attack in the form of demurrer to the petition for the writ because the appellee had failed to appeal timely from the decisions of the Board and the Common Pleas Court.

The appellant contends that this action by the Supreme Court of Ohio on June 15, 1966 affirmed the right of the Board to hear an appeal from an unclassified employee on the question of his unclassified status (the converse of said right of an unclassified employee as treated above) for reason that the order of the Board could not have been res judicata unless the Board had had the authority to issue it, that in turn was based upon said right to hear such an appeal. Had the Board not had such a right, then its order returning the twenty-one employees to their jobs would have been a nullity from the outset.

Based upon the above, the appellant contends that the decision in the Bingham case on June 15, 1966 did in effect overrule the decision of May 3, 1966 by the Court of Appeals in the petitioner's case; therefore, as of June 15, 1966, the petitioner became subjected for the first time to a denial of equal protection of the law resulting from the decision of the Court of Appeals on May 3, 1966. The petitioner was denied protection of the civil service law in appealing the question of his unclassified status whereas Bingham et al. were granted such protection.[5]

Respectfully submitted,

Donald F. Knox
Petitioner

FOOTNOTES

[1]For a more complete analysis of the comparative aspects of the Knox and Crabtree cases see the "Motion that the Court Receive Information on Certain Ambiguous Statements ..." as submitted to this Court.

[2]See the decision in the Crabtree case by the Court of Appeals as contained in the Appendixes accompanying the Petition, last par. of p. 17 and p. 18.

[3]The right of an unclassified employee to appeal the question of his unclassified status under the provisions of the civil service law has been upheld in several cases over the years; examples are cited in "Appendix B Accompanying the Motion that the Review ... be Delayed ...," p. 12.

[4]For analysis of those grounds, see ibid., p. 9.

[5]The petitioner asked his former attorney to make this point about the Bingham case to the Supreme Court of Ohio; the attorney first stated that such would not be a valid argument, but after the appeal to that court was dismissed he admitted that such an argument was valid. See ibid., p. 11.

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NO. 283

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

A MOTION THAT THE COURT RECEIVE INFORMATION CONCERNING THE UNTIMELINESS OF THE PETITION

DONALD F. KNOX
Petitioner

vs.

THE STATE OF OHIO
Respondent

Donald F. Knox
127 W. Northwood Ave.
Columbus, Ohio

Petitioner

MOTION

The petitioner respectfully requests that the Court receive the information stated below in the affidavit and on that basis consider the Petition for Writ of Certiorari timely for the purposes of further consideration of same. The petitioner bases this request upon the fact that the untimeliness of the petition arose out of circumstances completely beyond the control of the petitioner.

Respectfully submitted,

Donald F. Knox
Petitioner

AFFIDAVIT

Now comes Donald F. Knox, the affiant herein and first being duly sworn and cautioned according to law states the following:

1. That on Thursday, June 8, 1967, just two days prior to the deadline for filing the petition, which was on Saturday June 10, the affiant packed a box within his home and included 40 copies of both the Petition and the Appendixes plus the official record. Affiant believes that he also placed a large envelope on top of all the other material and addressed it to the Court: it included an affidavit as proof of service, a check for $100.00 and a covering letter listing all materials in the box. Also on the same day, the affiant had an affidavit notarized as proof of service.

2. That it was impossible to have mailed the materials earlier. The local post office stated that by mailing air-mail late in the afternoon of June 8, it would arrive in Washington, D. C. during the late hours of the same day. The box was insured for the maximum amount of $200.00 but not registered. This action was completed by 4:15 p. m. of June 8, 1967.

3. That on Saturday, June 16, over a week after mailing the box, he received a letter from the Office of the Clerk informing him that the check and proof of service had not been received. He immediately wrote and informed the Office of the Clerk that he believed he had placed the missing items in a large envelope on the very top of the other items within the box and asked that a check be made to determine if said envelope might be located. Affiant believed that such action was logical and proper in view of the fact that the missing envelope had not been found in his home.

4. That on Monday, June 19, he phoned the bank and stopped payment on the check for $100.00 (which has to this date not arrived at the bank).

5. That on June 21, 1967 he received a telegram from the Office of the Clerk stating that the docket fee and proof of service had not been received. Affiant then prepared a new check and affidavit as proof of service and mailed them two hours after receipt of said telegram.

6. That on about June 25, 1967 he received from the Office of the Clerk a letter dated June 23, stating that the replacement items were received and that the case was docketed on June 23, 1967.

7. That on July 10, 1967 he first learned that the Petition was considered untimely as a result of a conversation with an Assistant in the Office of the Attorney General of Ohio who had written to the Office of the Clerk about the matter.

8. That the act of writing to the Office of the Clerk on June 17, 1967 asking that that Office check to see if the missing envelope might be located was in no way intended to avoid the rules of the Court or cause inconvenience to the Office of the Clerk.

9. That a letter from the notary stating that an affidavit as proof of service was notarized on June 8, 1967 and a letter from the bank stating that affiant stopped payment as of June 19, 1967 were mailed to Mr. Rodak of the Office of the Clerk on September 5, 1967. Said items are presented in order to demonstrate that affiant did prepare proof of service and a check for $100.00 with full intention of including same in the box sent to the Court on June 8, 1967. Said missing items have not been located as of this date.

Thus concludes the affiant.

Donald F. Knox
Affiant

See next page for notarization.

Sworn to before me and in my presence this _____ day of September, 1967

M. B. Fox
Notary Public

My commission expires March 20, 1972.

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NO. 283

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

A MOTION THAT THE COURT DELAY CONSIDERATION OF THE PETITION UNTIL A FINAL DECISION IS RENDERED UPON PETITIONER'S NEW APPEAL TO THE COURTS IN OHIO

DONALD F. KNOX
Petitioner

vs.

THE STATE OF OHIO
Respondent

Donald F. Knox
127 W. Northwood Ave.
Columbus, Ohio

Petitioner

MOTION

The petitioner respectfully requests that the Court delay the consideration of the Petition for Writ of Certiorari in this case until a final decision is rendered upon petitioner's second appeal to the courts of Ohio in general and to the Court of Appeals of Franklin County, Ohio in the immediate instance.

MEMORANDUM IN SUPPORT OF THE MOTION

The basis for this second appeal to the courts of Ohio is that the petitioner was denied the right to have presented before the Supreme Court of Ohio, upon submission of his Motion to Certify, all of the instances of denial of federal constitutional rights. Such a denial resulted from the failure of his former attorney to act in accordance with several specific statements by the petitioner that he planned to appeal to the Supreme Court of the United States if necessary. All but one of those instances of denial of federal constitutional rights was mentioned in the Petition, but only the matter of the contrary decisions out of the Court of Appeals was brought before the Supreme Court of Ohio. This latter fact lessens the effectiveness of the Petition to the detriment of the cause of the petitioner.

The petitioner contends that, since the former attorney was highly experienced and knowledgeable and since he was informed several times of petitioner's objective, the failure to present those matters to the Supreme Court of Ohio represented a deliberate act whereby he substituted his judgment for that of the petitioner regarding the future of the case.

The petitioner contends that he has a right based

upon general principles of justice to appeal for a second time to the courts of Ohio in order to correct this failure on the part of his former attorney, which was a matter entirely beyond the control of the petitioner. The failure was not a matter of oversight or inexperience on the attorney's part but, as stated above, a matter of his making a decision which was not his to make.

In conjunction with this second appeal to the Court of Appeals of Franklin County, Ohio, the petitioner submitted to that court several items in support of said appeal, and those items are submitted herewith as Appendixes A, B and C.

There was one instance of a denial of a federal constitutional right that was not submitted in the Petition because the matter had not become part of the record. That instance pertained to the State Personnel Board of Review prior to that Board's decision in appellant's case and is described in Appendix B. The matter is now part of the record of the case since Appendix B was submitted to the Court of Appeals under another cover.

In addition to the subject cited just above, Appendix B provides a description of the various instances of denial of federal constitutional rights as the matter stood at the time of the oral hearing before the Supreme Court of Ohio on the Motion to Certify to that court and immediately prior to the rendering of the contrary decision out of the Court of Appeals on which the petitioner based his Motion for Rehearing to the Supreme Court of Ohio.

Furthermore, the Appendix B describes certain unusual actions by the State Personnel Board of Review and the Assistant Attorney General.

Appendix A accompanying this motion was also submitted to the Court of Appeals of Franklin County, Ohio under another cover in support of the second appeal to that court; it presented the bases upon which said appeal was brought to that court. In addition, it presents the numbers of the pages whereon a description is provided of the various points mentioned above.

Appendix C accompanying this motion is an affidavit which was presented to the Court of Appeals of Franklin County, Ohio in conjunction with the second appeal to that court and supplies the sworn statements supporting the points made in Appendix B.

The petitioner submits the enclosed appendixes for the purpose of informing this Court of the basis for the second appeal to the courts in Ohio.

The petitioner requests that a delay in the review of the Petition in this case be granted while awaiting the conclusion of this second appeal to the courts of Ohio and that the materials submitted thus far to this Court be utilized upon the ultimate review of the Petition. The time and expense incurred by the petitioner in preparing said materials has been very considerable in proportion to the petitioner's resources.

Respectfully submitted,

Donald F. Knox
Petitioner